LAW REPORTS OF TRIALS OF WAR CRIMINALS

Selected and prepared by

THE UNITED NATIONS
WAR CRIMES COMMISSION

VOLUME XIV

LONDON
PUBLISHED FOR
THE UNITED NATIONS WAR CRIMES COMMISSION
BY HIS MAJESTY'S STATIONERY OFFICE

1949

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One of the aims of this series of Reports is to relate in summary form the course of the most important of the proceedings taken against persons accused of committing war crimes during the Second World War, apart from the major war criminals tried by the Nuremberg and Tokyo International Military Tribunals, but including those tried by United States Military Tribunals at Nuremberg. Of necessity, the trials reported in these volumes are examples only, since the trials conducted before the various Allied Courts of which the Commission has had records number over 1,600. The trials selected for reporting, however, are those which are thought to be of the greatest interest legally and in which important points of municipal and international law arose and were settled.

Each report, however, contains not only the outline of the proceedings in the trial under review, but also, in a separate section headed " Notes on the Case ", such comments of an explanatory nature on the legal matters arising in that trial as it has been thought useful to include. These notes provide also, at suitable points, general summaries and analyses of the decisions of the courts on specific points of law derived primarily from a study of relevant trials already reported upon in the series. Furthermore, the volumes include, where necessary, Annexes on municipal war crimes laws, their aim being to explain the law on such matters as the legal basis and jurisdiction, composition and rules of procedure on the war crime courts of those countries before whose courts the trials reported upon in the various volumes were held.

Finally, each volume includes a Foreword by Lord Wright of Durley, Chairman of the United Nations War Crimes Commission.

continued inside back cover

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FOREWORD

This was intended to be the last Volume actually containing Law Reports, since the time is approaching when the Commission must finally wind up its operations. Under the circumstances, however, a difficulty has arisen in reference to an important trial, the last of the series of Subsequent Proceedings at Nuremberg, known as the Weizsaecker or Foreign Ministry case. It has been decided to deal with that case in Volume XV, which will be the final Volume of the series. It was originally intended that Volume XV should be devoted only to a general survey of all the cases reported in the series, but now room will be found for the Foreign Ministry case, if it can be reported before the end of March. If it is not then delivered the Commission will be compelled most regretfully to leave it out of these Reports.

The cases which are reported in this present Volume, as in others, are of a diverse character and cover a very considerable area. The most important of these cases is that of Hans Albin Rauter before the Netherlands courts, which deals with a number of topics, but in particular has a very instructive discussion of the nature of reprisals. Its further consideration will be reserved until after the other cases reported here.

Of these cases I do not think that a very elaborate comment is necessary beyond what is contained in the Notes appended to each case. In the case of Hans Paul Helmuth Latza and others, tried in the courts of Norway, the accused were charged with having committed a war crime, after the liberation of Norway, in that they through a denial of a fair trial, and though judging against their better knowledge, had unlawfully caused the death of five Norwegian citizens. The case is remarkable for two reasons. First, as a striking illustration of the importance which International Law invariably attaches to the stringent necessity of securing to accused war criminals a fair trial. The importance which was attached to it is particularly shown by the course of the Proceedings. The case was tried in the first instance by the Norwegian Lagmannsrett, by which Court the accused, Latza, was found guilty and sentenced to imprisonment for 15 years, while the two other defendants were acquitted. There was an appeal to the Supreme Court of Norway by the accused. On the appeal the Supreme Court quashed the decision of the Lagmannsrett and ordered a re-trial by a differently constituted Court. On the re-trial the Court acquitted all the accused. The Prosecution then appealed on questions of law against that decision, but by the final decision of the Supreme Court it was upheld and the appeal rejected. Thus we see there were two trials and two appeals, and the final result was the acquittal of all the accused. This no doubt shows the extreme scrupulosity of the Norwegian courts and their determination to do impartial justice, which is particularly to be applauded when it is remembered what outrageous atrocities were inflicted on the Norwegian people after the unjust aggression involved in the invasion. The case also is noteworthy because of the number of somewhat subtle contentions of fact and law which were debated. Broadly speaking, the issues in war crimes trials, though very momentous, do not admit of fine distinctions, but are decided on large

principles of International Law. I may add that in this case throughout not only were the trials held in the Norwegian courts, but they were taken under the Norwegian law as applied by the special Norwegian Act to war crimes committed during the occupation.

Another case in this Volume is the trial of Dr. Joseph Buhler, the Deputy Governor-General, before the Supreme National Tribunal of Poland, for war crimes and crimes against humanity committed in Poland during the occupation. The accused was the principal assistant of Hans Frank. In one sense it might have been thought that a special report of this case was not indispensable in these volumes because the facts which were in question are of the same character as those which were elaborately considered in the report on the case of Greiser in Volume XIII. There is, however, one point which is dealt with particularly in this case, and that is the finding that the occupation Government of which the accused was a member was a criminal organisation. The general attitude of the Polish courts is that they are bound by the specific decisions of the International Military Tribunal at Nuremberg as to the criminality or non-criminality of the particular organisations whose criminal nature the International Military Tribunal had to decide. The Polish courts, however, hold themselves free to declare criminal or non-criminal other organisations which were not considered from that point of view by the International Military Tribunal, and it was on this basis that it decided that the occupation Government of Poland was a criminal organisation. The reasons for this decision are stated by Dr. Litawski in his Note on the case. I do not repeat in this Foreword what he has said. As to the remainder of the case, the discussion by the Polish court is very interesting and is important as showing once more how a national court proceeds in these cases.

The case of Josef Hangobl involves a short but novel question, namely, what is the status under the Geneva Conventions of an airman who baled out over enemy territory and who, according to the finding, was not in the act of surrendering within the meaning of the Convention when killed by the accused. The accused was held guilty of the charge and sentenced to a period of imprisonment. It is difficult to tell from the report of the proceedings on what particular ground that decision was arrived at. These uncertainties are perhaps inevitable where no reasoned judgment is delivered. The case, however, is not without interest as showing a somewhat perplexing situation in law.

We now pass to the Far East from which come two cases. The first was tried at Shanghai and is of considerable interest as illustrating the curious position which may arise after an armistice or surrender. There were a great number of accused, all of whom except six were found guilty. They were sentenced to different periods of imprisonment. This case may be compared with another case, the Scuttled U-boats Case reported in Volume I. The characteristic of the offence proved may be summed up as being violation of the terms of surrender or of an armistice. The report deals very fully with the complications which may arise in such an issue.

The other Far Eastern case, which was tried at Nanking, included charges of crimes against peace as well as war crimes and crimes against humanity. I need only comment on the first of these charges : the main current of thought and decisions on crimes against peace which have been given since

the end of the war has been that such crimes can only be committed as a matter of legal principle by accused individuals who may be described as acting on the policy-making level. In this particular case, however, it is difficult to see that the accused came within that category. I do not think that this decision can be relied on as substantially affecting the general current of authority on this matter. Apart from this case and that of Greiser, reported in Volume XIII, no accused has been found guilty of crimes against peace except those of the major criminals who were convicted on that ground by the International Military Tribunals at Nuremberg and Tokyo. Apart from his conviction of crimes against peace it may be noted that there was abundant evidence against the accused of peculiarly atrocious offences in the nature of war crimes and crimes against humanity which would have justified the sentence.

The last trial reported in this Volume is that of Willy Zuehlke in which the final judgment was given by the Netherlands Special Court of Cassation. The accused was found guilty of several offences. He was a prison warden whose duty it was to guard persons detained in Dutch prisons, and was in command of the guards from the beginning of 1941 to September, 1944. He was charged with having committed offences contrary to the laws and customs of war and crimes against humanity. The charges included illegal detention of a number of Jews and physical ill-treatment of Jewish persons. The interesting feature, however, was the charge that he had committed a war crime in the denial of spiritual aid to prisoners before their execution. The charge was in some ways unusual and its discussion by the courts deserves careful examination.

I shall now add a few general observations on the case of Hans Albin Rauter in the Netherlands Special Court of the first instance and subsequently in the Netherlands Special Court of Cassation. That was a case of war crimes of what in the main may be described as the conventional character. It does, however, include a discussion, especially in the Special Court of Cassation, on fundamental questions which may still require elucidation. One of the questions is what is meant by the words of the charge " reprisals, taking the form of arrests, detentions and killing of hostages." Such offences may be envisaged both as war crimes and as crimes against humanity: that distinction, however, may be disregarded in this context. The view of the Special Court of Cassation, which certainly needs very careful study, is that what are there called " reprisals " for the crimes of the state cannot be taken except against a state. Reprisals, it is said, only come into question between states, and the responsibility of individuals attaches only on the basis of their own individual acts. On that footing, as the ground of a reprisal is thus deemed to be an act by the occupying state, the party to avail itself of counter action by way of so-called reprisal is the other and injured belligerent state. That, however, carries with it the necessary corollary that it is only individuals who are themselves guilty of unlawful acts (for instance espionage) who can be subjected to appropriate punitive measures.

What I regard, however, as very important is the proposed rule that neither so-called " hostages " nor so-called " reprisal prisoners " can be killed by the occupant if they cannot be proved to have individually committed a capital offence. Whatever the precise scope of this very interesting

Judgment, it certainly is not inconsistent with the view which I put forward in the Foreword to Volume VIII, that in the cases in question the death penalty cannot be inflicted against innocent inhabitants of the occupied country. The Judgment also discusses very constructively various other questions of the law of war crimes. All these questions cannot be discussed here within the limits of a Foreword. They will call for and receive elucidation in due course elsewhere.

The Netherlands and Chinese reports contained in this Volume, together with the Annex on Chinese war crimes laws, have been contributed by Dr. Zivkovic. Dr. Litawski wrote the Polish report, and Mr. Stewart that which deals with the Eisentraeger Trial. The outline of the Proceedings in the report on the Latza Trial was drafted by Mr. Aars-Rynning, while the notes on that case were added by Mr. Brand, who contributed the short report on the Hangobl Trial and, as previously, was Editor of the Volume.

WRIGHT.

London, *March*, 1949.

CASE No. 83

TRIAL OF TAKASHI SAKAI

Responsibility for Crimes against Peace and other offences.

CHINESE WAR CRIMES MILITARY TRIBUNAL OF THE MINISTRY OF NATIONAL DEFENCE, NANKING, 29TH AUGUST, 1946

A. OUTLINE OF THE PROCEEDINGS

The accused, Takashi Sakai, a Japanese, served as a military commander in China during the war of 1939-1945, and also prior to that, during the Sino-Japanese hostilities which followed the Mukden incident of 1931. The charges laid against him were described as constituting crimes against peace, war crimes and crimes against humanity. Some charges were made under the terms of Chinese municipal law and concerned offences against the internal security of the State.

1. FACTS AND EVIDENCE

The findings of the Tribunal concerning the accused's activities in China between 1931 and 1939 were as follows :

Takashi Sakai was one of the leaders who were instrumental in Japan's aggression against China. Soon after the Mukden incident of 1931 he instigated a man by the name of Li Chi Chun and his followers to form a gang for the purpose of creating disturbances in Peking and Tientsin and to organise terrorist activities. As a result the Secretary of the Kuomintang office in Tientsin, Li Min Yueh, and a correspondent of the Shanghai Daily Chu Shao-tien, were assassinated. In February, 1934, attempts were made on the lives of a Chinese General, Ma Chun-shan, and of the Chairman of the Provincial Government of Hopei, Yu Hsueh-chung, in Tientsin. In May, 1934, the accused threatened to attack Peking and Tientsin by artillery and air force, and demanded the dismissal of the heads of the local Chinese authorities in the province of Hopei. He also demanded the withdrawal of Chinese troops from Hopei. As a Commander of the Japanese 23rd Army in Kwantung, which was then operating in South China, he ordered his subordinates to assist in setting up a puppet administration and in organising a so-called " Peace Army," in an effort to overthrow the Chinese Government.

The following was established to have taken place during the period of the Second World War (1939-1945) :

As Regimental Commander of 29 Infantry Brigade in China, the accused incited or permitted his subordinates to indulge in acts of atrocity. Between November, 1941, and March, 1943, in Kwantung and Hainan over one hundred civilians were massacred by shooting or bayoneting ; twenty-two civilians were tortured ; women were drowned after severe beating and one

expectant mother was tortured ; two women were raped and mutilated, and their bodies were fed to dogs ; civilians were evicted from their homes and seven hundred houses were set on fire ; rice, poultry and other foods were plundered. On 17th and 18th December, 1941, in Hongkong, thirty prisoners of war were massacred at Lyumen and twenty-four more prisoners were killed at West Point Fortress. On 19th December, 1941, the personnel of a British medical unit were massacred—twenty persons in all. Between 24th and 26th December, 1941, seven nurses were raped and three mutilated, and sixty to seventy wounded prisoners of war were killed. Valuable collections of books were pillaged from libraries.

2. THE DEFENCE OF THE ACCUSED

The accused pleaded not guilty.

Regarding his demand in 1934 that Chinese troops from Hopei should be withdrawn and that Chinese administrative heads in Hopei should be dismissed, he pleaded that he had acted within the stipulations of the International (Final) Protocol of 1901. The latter constituted a settlement of the rights of eleven foreign Powers in China following incidents in which the German Minister, Baron von Ketteler, was assassinated and a number of Europeans were ill-treated or massacred. The Powers concerned included Japan.(1) They were given the right to keep troops in certain areas in China in order to maintain free communication between Peking and the sea. The areas involved included Tientsin and other places in the province of Hopei. The Chinese Government undertook specific obligations for the maintenance of order in the affected areas. All Chinese local administrative heads were made personally answerable for the order in their districts. If offences against foreigners recurred or other violations of existing treaties were not instantly suppressed and the culprits punished, the heads were to be dismissed by the Chinese Government and could not be appointed to new posts.

The accused's plea to the charge that he had taken part in a war of aggression and had committed a crime against peace, was that he had acted upon the orders of his Government. He also pleaded not guilty to the charges concerning atrocities on the grounds that he was not responsible for the acts of his subordinates as he had no knowledge of them.

3. FINDINGS AND SENTENCES

The accused's pleas were rejected and he was found guilty " of participating in the war of aggression " and " of inciting or permitting his subordinates to murder prisoners of war, wounded soldiers and non-combatants ; to rape, plunder and deport civilians ; to indulge in cruel punishment and torture ; and to cause destruction of property."

For his participation in a war of aggression the accused was found guilty of a crime against peace. In regard to the atrocities he was found guilty of war crimes and crimes against humanity.

He was sentenced to death.

---

(1) The other Powers were Austria, Hungary, Belgium, France, Germany, Great Britain, Italy, the Netherlands, Spain, Russia and United States of America.

B. NOTES ON THE CASE

1. JURISDICTION OF THE TRIBUNAL

The trial of Takashi Sakai was conducted under the terms of Chinese Rules governing the Trial of War Criminals which were in force at the time of the trial.(1)

According to Article 1 of these Rules the primary source of substantive law for Chinese war crimes tribunals is international law. The latter is supplemented by the provisions of the above Rules. In cases not covered by the Rules the law to be applied is that of the Chinese Penal Code. Article 1 reads as follows :

> " In the trial and punishment of war criminals, in addition to rules of international law, the present Rules shall be applied ; in cases not covered by the present Rules, the Criminal Code of the Chinese Republic shall be applied.
>
> " In applying the Criminal Code of the Chinese Republic, the Special Law shall as far as possible be applied, irrespective of the status of the delinquent."

The above provision was implemented in the case under review, both with regard to crimes against peace and to war crimes and crimes against humanity.

2. JURISDICTION OVER CRIMES AGAINST PEACE

The Tribunal's verdict on the count of crimes against peace was made with regard, though without express reference, to rules which were explicitly formulated in the latest development of international law in this sphere.

The concept of crimes against peace was first defined in the Charter of the International Military Tribunal at Nuremberg, which was instituted by the London Agreement of 8th August, 1945, for the trial of the Major War Criminals of the European Axis. Article 6 (A) of the Charter contains the following definition :

> " *Crimes against peace :* namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing."

Another definition was given, in almost identical terms, in the Charter of the International Military Tribunal for the Far East, which was instituted by a Proclamation of General MacArthur of 19th January, 1946, for the trial of Japanese Major War Criminals. Article 5 (A) of this Charter reads as follows :

> " *Crimes against peace :* namely, *the* planning, preparation, initiation or waging of a *declared or undeclared* war of aggression, or a war in violation of *international law*, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing."(2)

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(1) The above Rules were later replaced by a Law Governing the Trial of War Criminals of 24th October, 1946, an account of which will be found in the Annex to this Volume.

(2) The words in italics are those not appearing in the Nuremberg Charter.

Finally, a third and also very similar definition is contained in Article II (1) (A) of Law No. 10 of the Allied Control Council for Germany, of 20th December, 1945, which regulates the trial of persons other than major war criminals and is thus a clear indication that responsibility for crimes against peace is not confined to high State administrators, such as heads of State or members of Government, but may include any other person. The definition reads as follows :

> " *Crimes against peace :* Initiation of invasions of other countries and wars of aggression in violation of international laws and treaties, including but not limited to planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing."

In its Judgment, the International Military Tribunal at Nuremberg stressed that the punishment of crimes against peace, as provided in the Nuremberg Charter, was only a reflection of the rules that had evolved in international treaties between the First and Second World Wars, and according to which a war of aggression constituted a criminal offence punishable under international law. The treaties referred to included in particular the Paris or Kellogg-Briand Pact of 27th August, 1928, which *condemned* recourse to war for the solution of international controversies, and by which the Signatories *renounced* it as an instrument of national policy. Both Germany and Japan were among the sixty States bound by the Pact.

In the Nuremberg Charter the range of persons liable to prosecution and punishment for crimes against peace is defined in the first and last paragraph of Article 6. It includes *any* person implicated in its commission whether as an individual or a member of organisations, or as a leader, organiser, instigator or accomplice. The same follows from the Far Eastern Charter and Law No. 10.(1)

In the light of the foregoing provision it appears that, by trying the accused as a person charged with and prosecuted for crimes against peace, the Chinese War Crimes Military Tribunal at Nanking acted within the competence internationally recognised to courts of law in this sphere.

3. THE ACCUSED'S GUILT AS TO CRIMES AGAINST PEACE

From the wording used in the Judgment, it would appear that the accused was found guilty of crimes against peace for the reason that he had taken part in the war of aggression against China. No further qualifications can be found in the Judgment beyond this point, so that it would seem that, according to the Chinese Tribunal, the accused's liability lay in no other circumstances than in the fact that he had conducted military operations which formed part of a war of aggression.

This would follow from the wording of the formal verdict, which included the following terms :

> " The defendant, Takashi Sakai, having been found guilty of *participating* in the war of aggression. . . ."(2)

(1) Article II (2) of Law No. 10 includes explicitly " any person without regard to nationality or the capacity in which he acted."

(2) Italics inserted.

The same follows from a statement of the Tribunal, in which it dismissed the accused's plea of superior orders:

> " . . . Aggressive war is an act against world peace. Granted that the defendant *participated* in the war on the orders of his Government, a superior order cannot be held to absolve the defendant from liability for the crime."(1)

The rejection of the plea of superior orders was made on the basis of the generally recognised and already firmly established rule that to commit crimes upon superior orders, including those of a Government, does not relieve the perpetrator from penal responsibility, but may be taken in mitigation of the punishment.(2) The latter is left to the discretion of the courts. The above rule was expressed in Article 8 of the Chinese Rules Governing the Trial of War Criminals, whose relevant passages read :

> " Criminals are not exempted from responsibility in the following cases :
>
> " 1. If the act was committed in accordance with orders of superior officers.
>
> . . . ."

One point in connection with the Tribunal's findings concerning crimes against peace was not made clear in the Judgment. The Tribunal did not state whether the accused's guilt was determined for taking part in the war of 1939-1945, or whether it included the period of hostilities which had existed between Japan and China between 1931 and 1939. The events in which the accused took part in 1931-1934, in Peking and Tientsin, and in which he was engaged in activities against Chinese local administrative heads, were described in the Judgment immediately after the statement that he was " one of the leaders who were instrumental in Japan's aggression in China." This could be taken to mean that such activities were regarded by the Tribunal as having formed part of the " war of aggression " against China, and that its verdict on this count included this period preceding the outbreak of World War II.

On the other hand, however, there are in the Judgment indications that the Tribunal may have segregated this period from that of World War II and that its verdict was confined to the latter period only. When considering the events of 1931 and 1934 the Tribunal declared that the accused had thereby " violated international law by undermining the territorial and administrative integrity of China."(3) Later, however, after referring to the international treaties violated by the accused, the Tribunal added that " offences against the internal security of the State should be punished in accordance with the Criminal Code of the Republic of China." This reference to " offences against the *internal* security of the State " seem to fit the findings concerning the accused's guilt in the events of 1931-1934, where the internal security of the State would appear to have been at stake

(1) Italics inserted.

(2) On this point see *History of the United Nations War Crimes Commission and the Development of the Law of War*, H.M. Stationery Office, London, 1948, Chapter X, pp. 274-288. Compare also Vol. V of these Reports, pp. 13-22, and Vol. VII, p. 65.

(3) This was a reference to the terms of the Nine Power Treaty of 6th February, 1922, concerning the status of China, an account of which will be found later.

due to the accused's activities directed against Chinese local administrative heads and the maintenance of Chinese troops in the province of Hopei. With regard to both the Tribunal stressed that there was " no stipulations in the Final Protocol of 1901 which prohibited the Chinese Government from stationing Chinese troops in Hopei " and that it gave Japan no " right to demand the dismissal of Chinese Administrative Heads in Hopei." In this manner the above reference to offences against the internal security of the Chinese State and to the Chinese Penal Code may mean that, for the events of 1931 and 1934, the accused's guilt was determined under the terms of Chinese municipal law and not under those of international law. This would leave crimes against peace for that period out of the picture.

Irrespective of the above issue, the Tribunal stressed that, in committing crimes against peace for which he was found guilty, the accused had " violated the Nine Power Treaty of 1922 and the Paris Pact " of 1928. The relevant provisions invoked by the Tribunal were Art. 1 of the Nine Power Treaty and Art. 1 of the Paris (Kellogg-Briand) Pact.

The Nine Power Treaty was signed on 6th February, 1922, between the British Empire, the United States, Belgium, China, France, Italy, Japan, the Netherlands and Portugal. As stressed in its Preamble, it was concluded with a view " to stabilise conditions in the Far East, to safeguard the rights and interests of China, and to promote intercourse between China and the other Powers upon the basis of equality of opportunity." The first obligation undertaken by the Powers was to " respect the sovereignty, the independence, and the territorial and administrative integrity of China." It will be remembered that the last terms were invoked by the Tribunal against the accused. The full text of Article 1 of the Nine Power Treaty of 1922 runs as follows :

" The Contracting Powers, other than China, agree :

" (1) To respect the sovereignty, the independence, and the territorial and administrative integrity of China.

" (2) To provide the fullest and most unembarrassed opportunity to China to develop and maintain for herself an effective and stable Government.

" (3) To use their influence for the purpose of effectually establishing and maintaining the principle of equal opportunity for the commerce and industry of all nations throughout the territory of China.

" (4) To refrain from taking advantage of conditions in China in order to seek special rights or privileges which would abridge the rights of subjects or citizens of friendly States, and from countenancing action inimical to the security of such States."

Article 1 of the Paris Pact runs as follows :

" The High Contracting Parties solemnly declare, in the names of their respective peoples, that they condemn recourse to war for the solution of international controversies and renounce it as an instrument of national policy in their relations with one another."

As will be noticed, the combined effect of the above two Articles, which were binding upon Japan, was to make a military aggression against China a violation of the two Treaties.

With regard to the concept of crimes against peace the above references show two important features. The first is that the Tribunal had thereby stressed that the accused had taken part in "a war in violation of international treaties," which is included in the definitions of crimes against peace previously quoted. The second feature is that the Tribunal's verdict on this count was entirely based upon rules of international law, as evidenced by the texts of the Nuremberg and Far Eastern Charters, and of Law No. 10.

4. THE ACCUSED'S GUILT AS TO WAR CRIMES AND CRIMES AGAINST HUMANITY

With reference to offences against civilians and members of the armed forces for which the accused was found guilty, the Tribunal said :

> " In inciting or permitting his subordinates to murder prisoners of war, wounded soldiers, nurses and doctors of the Red Cross and other non-combatants, and to commit acts of rape, plunder, deportation, torture and destruction of property, he had violated the Hague Convention concerning the Laws and Customs of War on Land and the Geneva Convention of 1929. These offences are war crimes and crimes against humanity."

The relevant provisions of the above two Conventions which the Tribunal found to have been violated were : Article 28 of the Hague Regulations, forbidding " the giving over to pillage of a town or place, even when taken by assault " ; Article 46 of the same Regulations protecting " family honour and rights, individual life, and private property, as well as religious convictions and worships," and " forbidding confiscation of private property " ; Article 47 of the Hague Regulations declaring any pillage " expressly forbidden " ; Articles 1 to 6, 9 and 10 of the Geneva Convention relative to the Treatment of Prisoners of War, of 1929, which protect prisoners of war from ill-treatment, as well as protecting their lives.

The Tribunal dismissed the accused's plea that he could not be held responsible for the above violations because they were perpetrated by his subordinates and he had no knowledge of them. The Tribunal's findings were as follows :

> " . . . That a field Commander must hold himself responsible for the discipline of his subordinates, is an accepted principle. It is inconceivable that he should not have been aware of the acts of atrocities committed by his subordinates. . . . All the evidence goes to show that the defendant knew of the atrocities committed by his subordinates and deliberately let loose savagery upon civilians and prisoners of war."

The principle that a commander is responsible for the discipline of his subordinates, and that consequently he may be held responsible for their criminal acts if he neglects to undertake appropriate measures or knowingly tolerates the perpetration of offences on their part, is a rule generally accepted by nations and their courts of law in the sphere of the laws and customs of war. The above findings are therefore in line with the jurisprudence created with regard to this rule, in particular on the occasion of war crime trials held after the Second World War.(1)

(1) See *Trial of Tomoyuki Yamashita*, in Volume IV of this series, especially pp. 83-96 ; *Trial of Erhard Milch*, in Volume VII, especially pp. 61-64 ; *Trial of General Wilhelm List and others*, in Volume VIII, pp. 88-9 ; *Trial of Wilhelm von Leeb and* 13 *others* (High Command Trial), in Volume XII, pp. 105-12.

CASE No. 84

TRIAL OF LOTHAR EISENTRAGER AND OTHERS

BEFORE A UNITED STATES MILITARY COMMISSION, SHANGHAI, CHINA
3RD OCTOBER, 1946—14TH JANUARY, 1947

A. OUTLINE OF THE PROCEEDINGS

1. THE ACCUSED

The accused were : Lothar Eisentraeger, alias Ludwig Ehrhardt, Franz Siebert, Herbert Glietsch, Johannes Otto, Erich Heise, Oswald Ulbricht, Hanz Niemann, Ingward Rudloff, Bodo Habenicht, Hans Dethleffs, Wolf Schenke, Heinz Peerschke, Hans Mesberg, Johannes Rathje, Siegfried Fuellkrug, Walther Heissig, Jesco von Puttkamer, Alfred Romain, Ernst Woermann, Wilhelm Stoller, Elgar von Randow, Walter Richter, Hermann Jaeger, Felix Altenburg, Herbert Mueller, August Stock, and Maria Muller, all German nationals.

2. THE CHARGE

The prosecution preferred one common charge against all accused. This charge alleged that they, " between the 8th May and 15th August, 1945, individually and as officials, nationals, citizens, agents or employees of Germany, while residing in China at a time when the United States of America was at war with Japan did, in China, in a theatre of military operations, Knowingly, wilfully and unlawfully, violate the unconditional German surrender by engaging in and continuing military activity against the United States and its allies, to wit by furnishing, ordering, authorising, permitting and failing to stop the furnishing of aid, assistance, information, advice, intelligence, propaganda and material to the Japanese armed forces and agencies, thereby by such acts of treachery assisting Japan in waging war against the United States of America in violation of the laws and customs of war."

The charge was followed by bills of particulars against each of the accused. These bills of particulars described the accused by their functions, and may be analysed as follows :

(i) The principal accused, Ludwig Ehrhardt, was described as " head of a German intelligence agency known as ' Bureau Ehrhardt,' a unit of the German High Command." The charge against him was that he " wilfully, engaged in military activities against the United States and its allies, to wit, the collection of military intelligence concerning, *inter alia*, land, sea and air movements by the United States and its allies and transmission of it to the Japanese armed forces." He was also charged with " wilfully and unlawfully ordering, authorising and permitting his agents in Shanghai, Canton and Peiping to furnish aid and intelligence to the Japanese armed forces."

(ii) The accused Franz Siebert was described as " former German Consul-General and leader of the German community in Canton." He was charged with (*a*) " ordering, authorising, permitting and failing to stop continuation of German military activities . . . by persons under his command " ; (*b*) " wilfully and unlawfully ordering and instructing representatives of German business firms . . . to submit to him lists of all essential war materials in their possession, which lists were . . . submitted by him to the Japanese armed forces, enabling them to secure control and make use of said materials " ; (*c*) " wilfully and unlawfully ordering all German citizens and nationals in the Canton area, at a called meeting to obey his command to continue active assistance to the Japanese authorities under penalty of punishment by the Japanese."

(iii) The accused Herbert Glietsch was described as " secretary of the German Consulate at Canton and the leader of the German community there, and an agent of the German high command." He was charged with " ordering, authorising and failing to stop the continuation of German military activities, etc., by persons under his control," and with " decoding, approving and delivering . . . to the Canton chief of the ' Bureau Ehrhardt,' a German High Command Intelligence agency a telegram dated on or about 8th May, 1945, which unlawfully ordered and authorised the continuation of military activities."

(iv) The accused Jesco von Puttkamer and Alfred Romain were described as " head of the German Information Bureau at Shanghai, the military propaganda agency of the German Embassy to enemy occupied China " and " a member and employee of the German Information Bureau . . ." They were charged with wilfully and unlawfully engaging in military activity against the United States and its allies, to wit psychological warfare by designing and furnishing to the Japanese armed forces for their use propaganda material in the English language consisting of, *inter alia*, leaflets, posters and photographs designed to influence, adversely to the United States and its allies, the actions of the United States troops and civilian populations."

(v) The bills of particulars against the remaining accused may be grouped under two headings : (*a*) *engaging*[1] in military activities after surrender. The accused in this category were described as " members, agents or employees of the ' Bureau Ehrhardt ' an intelligence agency of the High Command," and they were charged with " wilfully and unlawfully engaging in military activities against the United States and its allies, to wit the collection, compilation, of military intelligence concerning, *inter alia*, land, sea and air movements by the United States and its allies and rendering of other aid, assistance, and advice to the Bureau Ehrhardt knowing it was for the use and benefit of and furnished to the Japanese armed forces " ;

(*b*) " *ordering*, *permitting* and *failing to stop others* to engage in military activities."[1]

(vi) The accused Ernst Woermann, German Ambassador in enemy occupied China, and the accused Elgar von Randow, Counsellor of the

[1] Italics inserted.

Shanghai office of the German Embassy, were described as " superiors of Lothar Eisentraeger " and charged in similar terms with " ordering and failing to stop " his activities.

All the accused pleaded not guilty.

3. THE EVIDENCE

During the years 1940 and 1941, before a state of war existed between China and the United States on the one side and Germany and Japan on the other, Germany established intelligence and propaganda agencies in China, covering the Far East. During this period a propaganda section was constituted as part of the German Embassy in Canton, and its head enjoyed diplomatic status. The heads of the various agencies in other towns had consular status and the whole organisation was directly responsible to the German High Command. After the severance of diplomatic relations between China and Germany, Germany established an Embassy with the Chinese puppet government at Nanking and with the approval of this government and the Japanese authorities, set up branch offices of its intelligence organisation at Shanghai, Canton and Peiping, which took over propaganda and intelligence activities from the Embassy.

The accused were all German nationals and can be grouped according to their positions within the German organisation in China, under three heads :

(1) the members of the Bureau Ehrhardt and the press intelligence group (both military intelligence organisations) ;

(2) the members of the German Information Bureau (a propaganda agency) ;

(3) those German diplomats and functionaries who were not members of these two organisations but were alleged to have controlled their activities.

The prosecution alleged that the intelligence agency known as Bureau Ehrhardt functioned under the auspices of the German Embassy. The agency was named after its chief, the accused Lothar Eisentraeger, alias Ludwig Ehrhardt. It had its main office in Shanghai, and branch offices in Canton and Peiping. The accused Rudloff, Habenicht, Dethleffs, Schenke, Peerschke, Mesberg, Rathje, Richter and Jaeger were members of the Shanghai office ; the accused Heise, Ulbricht, Niemann, members of the Canton office, and the accused Fuellkrug, Heissig, Stock and Maria Muller of the Peiping office.

The German Information Bureau was part of the Shanghai branch office of the German Embassy. The accused Puttkamer and Romain were members of this organisation and the accused Herbert Mueller was an agent of the German News and Propaganda Agency working in close connection with the Information Bureau.

Those accused who were not members of these two organisations were Woermann, the German Ambassador in Nanking, Stoller the head of the Shanghai branch office of the German Embassy and his deputy, von Randow, Siebert and Glietsch who were Consul General and Consular Secretary in Canton respectively, the accused Otto who was head of the Nazi party in South China and the accused Altenburg who was the head of the branch

office in Peiping. The chain of command, as alleged by the prosecution led from both the Bureau Ehrhardt and the Information Bureau to the head of the German Embassy office in Shanghai and from him through the German Ambassador in Nanking to the German Foreign Office and the German General Staff in Berlin.

The case for the prosecution was that these organisations which engaged in military activities against the United States and its allies during the war between the United States and Germany, continued their activities after Germany's surrender on the 8th May, 1945, in co-operation with or under the direction of the Japanese military authorities, until 15th August, 1945, when Japan too surrendered to the allies.

The evidence preferred by the prosecution showed that on 8th May, 1945, a telegram was sent by the accused Ehrhardt through the German Embassy to all agencies and sub-offices of the Bureau Ehrhardt in Canton, and Peiping. This telegram was signed by Ehrhardt and stated that the Bureau Ehrhardt was demobilising. The text of the telegram contained three main points :

(1) that the organisation ceased to exist and its members were to be demobilised ;

(2) that equipment should be turned over to the Japanese authorities who were to be instructed how to use it ;

(3) that the question of continuing work in co-operation with the Japanese was left to the discretion of every individual member of the organisation.

The prosecution maintained that the telegram was so worded as to suggest that co-operation with the Japanese was desirable, or even ordered, whereas the defence argued that the telegram was meant to be taken at its face value. The accused Heise who was the deputy head of the Peiping office of the organisation, testified that he took the telegram order of the 8th May to mean that he should continue to co-operate with the Japanese in the collecting of military intelligence. This telegram order was read out by the heads of the branch offices to their subordinates. Thereafter, a number of contracts with the Japanese authorities for service of a military nature, mainly the collecting of intelligence, were signed by the accused members of the Bureau Ehrhardt in Shanghai, Peiping and Canton, and by members of the German Information Bureau in Shanghai. As a result of these contracts, members continued to carry on their full activities after the German surrender. On 20th May an intelligence officer of the Japanese High Command at Nanking visited the Bureau Ehrhardt on orders from the Japanese Supreme Command at Tokio to convey to them the wish of the Japanese government to use the Bureau Ehrhardt to the greatest extent possible. He also told them that its intelligence concerning radio call signs and wave lengths was very valuable to the Japanese. After this date the Supreme Command at Nanking received intelligence reports including the data on wave lengths, call signs, time sheets and wireless messages intercepted from United States transports and ships once or twice weekly, from the Bureau Ehrhardt who had collected this information from its various agencies. This information was passed on to the headquarters of the Japanese armed forces at Nanking. During the latter part of June, the Japanese asked for the services of the Bureau Ehrhardt to be continued and improved. The

post-surrender services of the Bureau Ehrhardt or individual members thereof were performed voluntarily and a Japanese staff officer testified that he asked them to sign an agreement so that there could be no question of compulsory co-operation. Money was sent to the Bureau Ehrhardt by the Japanese authorities on two occasions and distributed amongst its members, but in many cases the remuneration consisted of food provided by the Japanese for the members of the German organisation. The evidence further showed that the accused were aware of the fact that the intelligence collected by the Bureau Ehrhardt was transmitted to the headquarters of the Japanese armed forces and in case of the propaganda section, that their propaganda material was intended ultimately to reach American troops.

The main defence of those accused who were charged with " having ordered or failed to prevent their subordinates from co-operating with the Japanese " was that after the surrender they had no longer any power to give valid orders to their staff and that whatever the members of their staff did after that date was not done on their instructions or orders. The accused Siebert who was German Consul-General in Canton added to this general defence that all Germans in China were subject to Chinese law as they had no extra-territorial rights and that therefore German officials had no control over their compatriots since the diplomatic and consular powers had ceased with the surrender.

The main defence of those accused who were in subordinate positions and who were charged with engaging in military activity was two-fold : they pleaded that they took the telegram and the messages sent out by the Bureau Ehrhardt after the surrender as orders to continue co-operation with the Japanese and also that they were at the mercy of the Japanese authorities because they could only obtain money and food by working for them.

The following paragraphs set out further details relating to the individual accused :

(*a*) *Bureau Ehrhardt, Shanghai :* (Ehrhardt, Habenicht, Mosberg, Peerschke, Richter, Dethleffs, Jaeger, Rathje and Rudloff).

All above named accused had actual knowledge of the unconditional surrender of Germany. Ehrhardt admitted that the meaning of unconditional surrender was known to him and that the German military surrender applied to his activities. All these accused signed an agreement to continue the work for the Japanese and none were forced to do so. Ehrhardt stated that Rathje was his immediate subordinate, Mosberg served under Rathje, Richter was a wireless operator, Peerschke a micro-photograph expert and Habenicht a code man. Dethleffs and Rathje also did code work and Jaeger functioned as a general clerk. Ehrhardt testified that the arrangements for the operations were made with the Japanese Chief of Staff at Tokio and the Japanese Supreme Command at Nanking. At the time of the German surrender the Japanese Supreme Command received instructions to secure Ehrhardt's services. A major of the General Staff was sent to Shanghai to discuss the ways and means of effecting the Bureau Ehrhardt's co-operation. This staff officer testified that shortly after the German surrender he discussed with other Japanese staff officers the desirability of having Ehrhardt's continued co-operation and it was suggested as proof of the voluntary nature

of their service that the Germans should be requested to sign an agreement to continue work. Accordingly at a meeting on the 20th May, 1945, at the Bureau Ehrhardt, Ehrhardt promised that he would do what he could in the matter of co-operation and that he would pass on the request to his subordinates. A few days later an agreement signed by various members of the Bureau Ehrhardt was sent to the Japanese High Command and filed there. The office of the Bureau Ehrhardt continued to function and all above-named accused continued to go there regularly.

(*b*) *Bureau Ehrhardt, Canton, and Consular General, Canton :* (Heise, Ulbricht, Niemann and Siebert).

The above-named accused, as members of the Bureau Ehrhardt, continued working for the Japanese after the surrender. Heise testified that shortly before the surrender a telegram was received in German Embassy Code from Ehrhardt suggesting that work be continued with the Japanese and a later telegram received through the Japanese to the effect that the Bureau Ehrhardt in Shanghai was co-operating on an individual basis, confirming his opinion that co-operation was a necessity, especially as he received successive monthly salaries in May and June. He testified that they intercepted messages concerning the warning net employed by the United States forces during the battle on the island of Okinawa. Ulbricht and Niemann monitored United States wireless communications in morse code and the material was turned over to the Japanese agencies. Siebert continued to act as official German Consul General at Canton for a month after the surrender and even went to the Japanese authorities to ask what should be done with the Branch office of the Bureau Ehrhardt in Canton. He knew of Ehrhardt's operations and did nothing to stop them by way of orders or advice. On the contrary, when asked for advice by the accused Ulbrecht, he said that in his opinion the only alternative was to continue working with the Japanese. Even after the Consulate was formally closed, Siebert continued to exercise consular prerogatives and functions and as late as July threatened a German national in Canton that he was still Consul-General and would not hesitate to use all the powers at his disposal to prevent any undermining of his authority. In June, 1945, he submitted to the Japanese detailed lists regarding offers of important war materials by German firms in Canton. These goods included aeroplane propellers and wheels, field telephones, radio equipment, various precision instruments, etc. Siebert admitted that he was never threatened by the Japanese to comply with their instructions, but had done so because he considered it his duty.

(*c*) *Bureau Ehrhardt, Peiping, and Press Intelligence Group at Peiping :* (Füllkrug, Heissig, Stock and Maria Müller).

The evidence showed that the accused Maria Müller, Stock, Heissig and Fuellkrug rendered intelligence aid to the Japanese at private conferences and weekly intelligence meetings presided over by a Colonel on the Japanese General Staff. It is also clear from the evidence that Fuellkrug and Heissig ordered their subordinates Stock and Maria Muller to carry on working with the Japanese. Although the accused attempted to minimise the importance of their participation in these meetings and press conferences, the evidence as a whole shows that they took an active part in them and that the Japanese representatives at these conferences relied on the information supplied by

the accused. The evidence also showed that the accused Altenburg not only issued no orders to the Germans to cease their activities after the surrender, but that he actually called a meeting in which he advised all Germans who could be of service to the Japanese to co-operate with them in every possible way.

(*d*) *German Information Bureau, German News Service :* (Puttkamer, Romain, Altenburg and Müller).

The accused Puttkamer and Romain continued their work on propaganda leaflets after the surrender. Some of the pamphlets they turned out explained to the readers the uselessness and horrors of war and invited them to lay down their arms. They were written in English and obviously intended to reach the United States troops. The writers signed themselves " Organisation of American Soldiers serving Overseas." About 5 or 6 different types of anti-allied propaganda pamphlets were supplied to the Japanese between the material dates of the charge and about 150,000 to 20,000 of each type were printed. The accused Altenburg and Herbert Müller provided a news agency for the Japanese forces in China and continued their work until these forces surrendered.

4. FINDINGS AND SENTENCES

The following 21 accused were found guilty and sentenced to the terms of imprisonment set out against their names.

Lothar Eisentraeger, alias Ludwig Ehrhardt,	Life imprisonment
Ingward Rudloff,	10 years ,,
Bodo Habenicht,	10 years ,,
Hans Dethleffs,	10 years ,,
Heinz Peerschke,	5 years ,,
Mans Mosberg,	20 years ,,
Johannes Rathje	15 years ,,
Walter Richter,	10 years ,,
Hermann Jaeger,	10 years ,,
Jesco von Puttkamer,	30 years ,,
Alfred Romain,	30 years ,,
(Reduced to 20 years by the Reviewing Authorities)	
Franz Siebert,	5 years ,,
Erich Heise,	20 years ,,
Oswald Ulbricht,	5 years ,,
Hans Niemann,	5 years ,,
Felix Altenburg,	8 years ,,
Herbert Mueller,	10 years ,,
Siegfried Fuellkrug,	20 years ,,
Walther Heissig,	20 years ,,
August Stock,	5 years ,,
(Reduced to 2 years by the Reviewing Authorities)	
Maria Muller,	5 years imprisonment
(Reduced to 2 years by the Reviewing Authorities)	

Six of the accused (Glietsch, Otto, Schenke, Woermann, Steller and Randow) were acquitted.

B. NOTES ON THE CASE

1. PLEA TO THE JURISDICTION OF THE COURT

A plea to the jurisdiction of the court was filed on behalf of all accused alleging in substance that the accused were German citizens and residents of China, and thus subject only to Chinese law and the jurisdiction of Chinese courts. The defence submitted : (1) that the United States jurisdiction over crimes was restricted solely to those committed within its own territory or territory occupied by its armed forces ; (2) that the abrogation by treaty in 1943 of the extra-territorial privileges of the United States in China left the United States Military Commission without authority to exercise jurisdiction over the accused and that according to the criminal code of the Republic of China, which the defence alleged was the proper law to be applied to this case, the High Court of Shanghai had exclusive jurisdiction over the accused ; (3) that the Military agreement between China and the United States on which the court's jurisdiction was based had never been ratified by the Legislative Assembly of the Republic of China and therefore was null and void and in any case any military agreement for the functioning of United States war crimes courts on Chinese soil was inoperative after the cessation of hostilities as the forces of the United States were not occupational forces but only an expeditionary force on allied soil.

The motion was overruled by the Commission. The main argument centred on the first submission. The prosecution quoted the case of the United States against Sawada and others where a similar argument was rejected by a United States Military Commission.(1) The argument is erroneous in its conception. The territoriality of jurisdiction in criminal cases is based on the reasonable premise that in ordinary criminal cases an offender should be judged by the law of the place where the crime was committed, but even in such cases departures are frequently made from the usual rule where practice requires, *e.g.*, counterfeiting of domestic currency abroad, or treason committed abroad in English Criminal law. A war crime, however, is not a crime against the law or criminal code of any individual nation, but a crime against the *ius gentium*. The laws and usages of war are of universal application, and do not depend for their existence upon national laws and frontiers. Arguments to the effect that only a sovereign of the *locus criminis* has jurisdiction and that only the *lex loci* can be applied, are therefore without any foundation.(2)

With regard to the third submission, the prosecution invited the court to take judicial notice of the fact that the Republic of China had invited the United States to send military forces to China in order to defeat the common enemy. In view of this, the United States army entered China as an allied expeditionary force with the rights and privileges as well as the duties which are well recognised in international law as attaching to such a force. The agreement on which the defence relied was, therefore, not more than the implementation of joint military operations. The jurisdiction of the Military Commission in this case was, thus, not dependent on this agreement but existed since the invitation of the Chinese government to the United States

(1) See Volume V, pp. 8-10 of this series.

(2) For another example of a military court of an allied nation trying war criminals on the territory of one of its allies, see the *Almelo Trial*, Vol. I of this series, pp. 42 *et seq.*

to send troops to Chinese territory to wage war. One of the corollaries of waging war and after the Moscow Declaration of 1943, during the last war one of its declared objectives, is the punishment of those who violate the laws of war. This was held by the Supreme Court of the United States *in re Yamashita* :([1])

> " An important incident to the conduct of war is the adoption of measures by the military commander, not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who, in their attempt to thwart or impede our military effort, have violated the law of war. . . . The trial and punishment of enemy combatants who have committed violations of the law of war is thus not only a part of the conduct of war operating as a preventative measure against such violations, but is an exercise of the authority sanctioned by Congress to administer the system of military justice recognised by the law of war. The war power, from which the commission derives its existence, is not limited to victories in the field, but carries with it the inherent power to guard against the immediate renewal of the conflict and to remedy, at least in ways Congress has recognised, the evils which the military operations have produced." (*Yamashita* v. *Steyer*, 66 Sup. Ct. Rep.)

2. MOTION TO DISMISS THE CHARGES

A motion to dismiss the charges was filed by all defendants mainly on the ground that the acts charged did not constitute a war crime because (*a*) " the charges did not state sufficient facts which constitute a crime under the laws and usages of war " ; (*b*) " a violation of certain terms by individuals although punishable, does not constitute a war crime unless the acts constituting the violation thereof are such as in themselves constitute a violation of the laws and customs of war " ; (*c*) " the charge did not allege that the accused had been ' officially ' notified of the German surrender, though they had ' actual notice '."

The commission denied the motion. The legal position with regard to submissions (*a*) and (*b*) is dealt with under (3) below.

With regard to (*c*) it seems obvious that the commission held that it was sufficient proof of *mens rea* on the part of the accused if it was proved that the accused were aware of the surrender and thus must have been aware of the fact that their activities were violations of its terms. How these terms had been communicated to them is immaterial.

3. VIOLATIONS OF THE TERMS OF SURRENDER OR OF AN ARMISTICE

The two most common means of bringing about a cessation of hostilities between belligerents are an armistice or the surrender of one belligerent. Such surrender may be a " stipulated " or a " simple " surrender. In case of a stipulated surrender the armed forces of the two belligerents enter into a convention usually referred to as a " capitulation," laying down the conditions under which one belligerent is laying down his arms. If no such capitulation is entered into, but one belligerent is ready to surrender without

([1]) See Vol. IV, pp. 38 *et seq.*

special conditions of surrender, then this is referred to as simple or unconditional surrender. The distinction between these modes of terminating an armed conflict is recognised by international law.(1) Their common denominator is the condition that hostilities between the belligerent parties must cease. A violation of any of these conventions entered into by the belligerents to suspend or terminate hostilities, whether such conventions be an armistice or a capitulation or terms of a simple surrender, is unlawful. Such a breach is an international delinquency if committed by a belligerent and a war crime if committed by an individual. With regard to violations of an armistice, the Hague Convention contains the following regulations :

> " *Article* 40. Any serious violation of the armistice by one of the parties gives the other party the right of denouncing it, and even, in cases of urgency, of recommencing hostilities immediately.
>
> " *Article* 41. A violation of the terms of the armistice by individuals acting on their own initiative only entitles the injured party to demand the punishment of the offenders and, if there is occasion for it, compensation for the losses sustained."

Professor Lauterpacht(2) says :

> " Any violation of armistices is prohibited, and, if ordered by the Governments concerned, constitutes an international delinquency. In case an armistice is violated by members of the forces on their own account, the individuals concerned may be punished by the other party in case they fall into his hands. But apart from this no unanimity exists among the writers on international law as to the rights of the injured party in case of violation by the other party ; many assert that the injured may at once, without giving notice, reopen hostilities ; others maintain that he may not, but has only a right to denounce the armistice."

As a sample of such violation, Professor Lauterpacht mentions the scuttling of German ships at Scapa Flow on 21st June, 1919, by order of Admiral von Reuter.

The Hague Convention deals with violations of capitulations in Art. 35 :

> " Capitulations agreed upon between the contracting parties must take into account the rules of military honour. Once settled, they must be scrupulously observed by both parties."

Professor Lauterpacht says :(3)

> " That capitulations must be scrupulously adhered to is an old customary rule, since enacted by Article 35 of the Hague Regulations. Any act contrary to a capitulation would constitute an international delinquency if ordered by a belligerent government, and a war crime if committed without such order. Such violation may be met by reprisals or punishment of the offenders as war criminals.
>
> " When there is no capitulation, but a simple surrender, it is a duty of the surrendering force to stop firing as soon as the white flag has been

(1) See Oppenheim-Lauterpacht, *International Law*, 6th Edition, Revised, Volume II, p. 430.

(2) Oppenheim-Lauterpacht, *International Law*, 6th Edition, Revised, Volume II, p. 440.

(3) *Op. cit.*, paragraph 230.

hoisted and the enemy is approaching to take possession. Those members of the surrendering force who continue to fire lose their claim to receive quarter, and may therefore be killed on the spot. Or, if taken prisoners, they may be punished as war criminals."

It can thus be said that there is no doubt that any violation of a surrender, be it a conditional or simple surrender, as well as a violation of an armistice, is an act of treachery and if committed by an individual, punishable as a war crime.

4. THE INSTRUMENT AND THE TERMS OF SURRENDER OF THE GERMAN ARMED FORCES IN 1945

The surrender of all German armed forces on 8th May, 1945, was unconditional and the meaning of " unconditional surrender " is absolute. Such surrender is an undertaking by military forces based on military honour, and failure to abide by its terms is a war crime regardless of whether damage results or not.

The prosecution based their charge on the " act of military surrender " dated 8th May, 1945, and on the so-called " Berlin Declaration " of 5th June, 1945. The following portions of these documents are set out below as those parts of the terms of surrender to which the charge and particulars seem to relate :

" *Act of Military Surrender, 8th May*, 1945

" 1. We the undersigned, acting by authority of the German High Command, hereby surrender unconditionally to the Supreme Commander, Allied Expeditionary Force, and simultaneously to the Supreme High Command of the Red Army all forces on land, at sea, and in the air who are at this date under German control.

" 2. The German High Command will at once issue orders to all German military, naval and air authorities and to all forces under German control to cease active operations at 2301 hours Central European time on 8th May, 1945, to remain in the positions occupied at that time and to disarm completely, handing over their weapons and equipment to the local allied commanders or officers designated by Representatives of the Allied Supreme Commands. No ship, vessel, or aircraft is to be scuttled, or any damage done to their hull, machinery or equipment, and also to machines of all kinds, armament, apparatus, and all the technical means of prosecution of war in general.

" 4. This act of military surrender is without prejudice to, and will be superseded by any general instrument of surrender imposed by, or on behalf of the United Nations and applicable to Germany and the German armed forces as a whole.

" 5. In the event of the German High Command or any of the forces under their control failing to act in accordance with this Act of Surrender, the Supreme Commander, Allied Expeditionary Force, and the Supreme High Command of the Red Army will take such punitive or other action as they deem appropriate."

" *Declaration Regarding the Defeat of Germany, 5th June,* 1945

" The German armed forces on land, at sea and in the air have been completely defeated and have surrendered unconditionally and Germany, which bears responsibility for the war, is no longer capable of resisting the will of the victorious Powers. The unconditional surrender of Germany has thereby been effected, and Germany has become subject to such requirements as may now or hereafter be imposed upon her. . . .

" It is in these circumstances necessary, without prejudice to any subsequent decisions that may be taken respecting Germany, to make provision for the cessation of any further hostilities on the part of the German armed forces, for the maintenance of order in Germany and for the administration of the country, and to announce the immediate requirements with which Germany must comply. . . .

" In virtue of the supreme authority and powers thus assumed by the four Governments, the Allied Representatives announce the following requirements arising from the complete defeat and unconditional surrender of Germany with which Germany must comply :

Article 1

" Germany, and all German military, naval and air authorities and all forces under German control shall immediately cease hostilities in all theatres of war against the forces of the United Nations on land, at sea and in the air."

Article 2

" (*a*) All armed forces of Germany or under German control, wherever they may be situated, including land, air, anti-aircraft and naval forces, the S.S., S.A. and Gestapo, and all other forces or auxiliary organisations equipped with weapons, shall be completely disarmed, handing over their weapons and equipment to local Allied commanders or to officers designated by the Allied Representatives."

Article 5

" (*a*) All or any of the following articles in the possession of the German armed forces or under German control or at German disposal will be held intact and in good condition at the disposal of the Allied Representatives for such purposes and at such times and places as they may prescribe—

(iv) All transportation and communications facilities and equipment, by land, water or air ;

Article 8

" There shall be no destruction, removal, concealment, transfer or scuttling of, or damage to, any military, naval, air, shipping, port, industrial and other like property and facilities and all records and archives, wherever they may be situated, except as may be directed by the Allied Representatives."

Article 9

" Pending the institution of control by the Allied Representative over all means of communication, all radio and telecommunication

installations and other forms of wire or wireless communications, whether ashore or afloat, under German control, will cease transmission except as directed by the Allied Representatives."

Article 10

" The forces, nationals (sic), ships, aircraft, military equipment, and other property in Germany or in German control or service or at German disposal, of any other country at war with any of the Allies, will be subject to the provisions of this Declaration and of any proclamations, orders, ordinances, or instructions issued thereunder."

Article 14

" This Declaration enters into force and effect at the date and hour set forth below. In the event of failure on the part of the German authorities or people promptly and completely to fulfil their obligations hereby or hereafter imposed, the Allied Representatives will take whatever action may be deemed by them to be appropriate under the circumstances."

The Prosecution did not specify any particular articles of these documents on which they relied, but it would appear that the charges can be based on the general stipulation that " all forces under German control shall immediately cease hostilities *in all theatres of war* against forces of the United Nations (Article 1).(1)

It appears that the acts set out in the particulars of the charge were deemed " hostilities." The activities of the Bureau Ehrhardt would seem to offend particularly against Article 9. " All means of communication, all radio and telecommunication installations and other forms of wire or wireless communications, whether ashore or afloat, under German control, will cease transmission except as directed by the Allied Representative." The power to try those who break the terms of surrender as war criminals can be based—apart from the laws and usages of war as set out in (3)—on Article 5 of the Act, and Article 14 of the Berlin Declaration.

5. POST-SURRENDER HOSTILITIES OF MEMBERS OF SURRENDERED FORCES, VIEWED AS A WAR CRIME WHERE SUCH HOSTILITIES WERE COMMITTED BY ASSISTING THE FORCES OF AN ALLIED BELLIGERENT WHO HAD NOT SURRENDERED

In the " Scuttled U-Boat Case," Gerhard Grumpelt, a former Lieutenant of the German Navy who had scuttled two U-boats after the German surrender was tried by the British Military Court at Hamburg for violating the terms of surrender. In that case, reported in a previous volume,(2) the prosecution based their case on paragraph 1 of the Instrument of Surrender signed on the 4th May, 1945, which provided that " the German Command agrees to the surrender of all German armed forces . . ." The two further conventions signed by the German Command at Rheims on the 8th May and at Berlin on the 9th May, 1945, and the Berlin Declaration of the 15th June, 1945, did not enter into that case as the offence charged was committed on 6th May, 1945.

(1) Italics inserted.

(2) See Volume I of this series, p. 55.

The main novelty of the charge in this case is that the accused, as members of the German armed forces committed acts of hostilities after the surrender not in a theatre of war where general hostilities had ceased, but in a theatre of war where the general hostilities were still being carried on by forces allied to their own. The defence argued that the accused had " a perfect right " to join forces with the Japanese because the accused had not taken part in the " German war against the allies in the European theatre " but in " another war." As there is no judgment in this case, it is impossible to know the court's opinion as to what would have been in their view the correct conduct in these circumstances. It may be argued that the accused should have stayed in China claiming non-belligerent status or that they could have demanded their repatriation to Germany. The evidence showed that some members of the German armed forces were in fact repatriated between the date of the German surrender and the Japanese surrender. Though this question remains open, there can be no doubt that the law is settled on the point that members of the armed forces of a belligerent whose entire armed forces have surrendered must abstain from all hostilities wherever they may find themselves on the date of such surrender and that by co-operating with an allied belligerent and *a fortiori* by joining the forces of such belligerent, they violate the terms of surrender and thus commit a war crime.

6. ALL NATIONALS, NOT MERELY MEMBERS OF THE ARMED FORCES OF A SURRENDERED BELLIGERENT, ARE BOUND BY THE TERMS OF THE SURRENDER

All accused were civilians. They were described in the charge as " officials, nationals, citizens, agents, and employees of Germany residing in China," thus implying their civilian status. They were all charged in the bill of particulars with " willingly and unlawfully engaging in military activities against the United States. . . ." The following arguments were, in fact, put forward by the defence :

(*a*) That at the time of the surrender the accused were not under the " control " of the German High Command or the German Government (with reference to Articles 1 and 2 of the Act of Military Surrender, 8th May, 1945), but were civilian residents in Japanese-occupied China.

(*b*) That since certain of the accused were not " military men," they could not be charged with war crimes since the German surrender did not apply to them.

All members of the Bureau Ehrhardt were described in the bills of particulars as " members of the Bureau Ehrhardt, an Intelligence Agency of the German High Command and it thus became a question of evidence whether the prosecution had proved that the Bureau Ehrhardt was an agency of the High Command and its members therefore members of the German armed forces. It appears from the findings that the court considered this to have been proved. That does not, however, apply in the case of the remaining accused and it would, therefore, seem that by finding some of these remaining accused who were not members of the Bureau Ehrhardt guilty of the charge as elaborated by the bills of particulars, the court held that the terms of surrender applied to all nationals of the surrendering belligerent and not only to the armed forces and that all such nationals must wherever they may find themselves at the time of such surrender refrain from activities which

are either considered to be military activities or contrary to the terms of surrender. The court, in rejecting the motion for a finding of not guilty at the close of the prosecution case said : " A careful reading of the [surrender] instrument and consideration of its implications can lead to but one inescapable conclusion, namely that the armed forces of Germany had been overwhelmed, that Germany as a nation had been defeated and that as a nation it was surrendering unconditionally to the will of the victor. In doing so the instrument at once became binding upon all persons. This was a capitulation not of a mere fortress or a mere army or two ; it was unconditional surrender of all forces under German control and carried with it all people of the German nation."

7. DIPLOMATIC STATUS OF THE ACCUSED

With the exception of the accused Schenke, all accused were members of the Diplomatic Corps or of the staff of the German Embassy in Nanking or one of its branch offices in Peiping or Shanghai. The question of their status was not raised in a special motion, but in the motion for a finding of not guilty the defence mentioned the " extra-territoriality of the defendants " and also the " diplomatic privileges " to which they were entitled. It seems that the court held by implication that their status did not protect them in any way if they were guilty of a violation of the terms of surrender.

8. WHAT CONSTITUTES " MILITARY ACTIVITIES " ?

The charge against the accused was elaborated in the bills of particulars but the commission in finding the accused guilty of the charge did thereby obviously not express any opinion as to the bill of particulars. In order to ascertain which acts committed by the accused were considered by the commission as war crimes, one must examine the charge in conjunction with the evidence which the court admitted as relevant to proving or disproving the charge. The following acts, evidence of which was admitted by the commission, may be taken as an indication as to which acts of the accused were regarded as " engaging in military activity " :

(1) passing of radio messages, reporting of call signs, wave lengths, time sheets and wireless messages ;

(2) collecting of intelligence with respect to events relating to the allied war effort in the form of movement of troops, ships, aircraft, as well as other material information collected by them ;

(3) writing and transmitting propaganda destined for the United States troops ;

(4) ordering or advising persons under their command to offer their services or engage in work of a military nature with the Japanese armed forces ;

(5) encouraging the members of the German community to co-operate with the Japanese armed forces ;

(6) submitting to the Japanese authorities lists of raw materials and equipment in possession of members of the German community in order that the Japanese forces may seize them.

CASE No. 85

TRIAL OF DR. JOSEPH BUHLER

Staatssekretär and Deputy Governor-General

SUPREME NATIONAL TRIBUNAL OF POLAND

17TH JUNE—10TH JULY, 1948

Liability for War Crimes and Crimes against Humanity Committed by Enacting, and in Pursuance of Laws Issued by Belligerent Power for the Occupied Territory. Occupation Government as a Criminal Organisation.

A. OUTLINE OF THE PROCEEDINGS

1. THE ACCUSED

Before the outbreak of war the accused Dr. Joseph Buhler was a *Ministerialrat* and *Ministerialdirektor* of the Third Reich. After the occupation of Poland and her illegal and arbitrary division by Germany into two separate parts, *i.e.*, the Western Territory which was incorporated into Germany, and the central and southern territories of which the so-called General Government was formed under the governorship of Hans Frank, the accused had been transferred to the latter part of Poland and entrusted by Hitler with the highest functions in the German civil administration of the General Government. Throughout the German occupation the accused held there either successively or simultaneously one or more of the following positions : (*a*) Chief of the Office of the Governor-General (*Chef des Amtes des Generalgouverneurs*) ; (*b*) Secretary of State and Chief of the Government (*Staatssekretär und Leiter der Regierung des Generalgouvernements*) ; and (*c*) Deputy (*Stellvertreter*) to the Governor-General Hans Frank. The accused was also a member of the Nazi Party, although he did not hold in this organisation any of the leading positions.(1)

(1) In accordance with the German-Soviet Pact of 28th September, 1939, the Republic of Poland was partitioned as follows :

Out of the entire territory of 150,486 square miles, with a population of 35,340,000, some 72,866 square miles, with a population of some 22,250,000 came under German occupation, and some 77,620 square miles, with a population of some 13,090,000 were taken over by Soviet Russia.

From the beginning, the German-occupied territories were divided into two parts almost equal in extent :

(*a*) The territories of Western Poland with some additions of Central and Southern Poland, which, in accordance with the Decree of 8th October, 1939, published in the *Reichsgesetzblatt*, but contrary to international law, were incorporated in the German Reich on 26th October, 1939;

(*b*) Of the remainder of the Central and Southern Poland, including the cities of Warsaw, Cracow and Lublin, the so-called Government General was created. This area was intended by the Germans to be a kind of protectorate. It was originally called the " Government General of the Occupied Polish Areas " (*General Gouvernement der besetzten polnischen Gebiete*). On 18th August, 1940, however, this terminology was changed, and thenceforth the territory was called " General Gouvernement " or *General Gouvernement des Deutschen Reichs.*

2. THE CHARGES

It was charged that throughout the period from 28th October, 1939, to 17th January, 1945, on the territory of Poland occupied by the German Reich, the accused :

(i) was a member of the occupation government (the German civil administrations) of the General Government, which was a criminal organisation ;

(ii) acting on behalf of the German Government and of the Nazi Party, either on his own initiative or in pursuance of orders received from the German civil, military and party authorities, he committed war crimes and crimes against humanity, and in particular, that by planning, preparing, organising, abetting and helping in their execution he participated in the commission of the following crimes :

(*a*) individual and mass murders of the civilian population,

(*b*) torturing, ill-treating and persecuting of Polish civilians,

(*c*) systematic destruction of Polish cultural life and looting of Polish art treasures, germanisation, seizure of public property, and in economic exploitation of the country's resources, and of its inhabitants,

(*d*) in systematically depriving Polish citizens of private property.

3. THE EVIDENCE AND FINDINGS OF THE TRIBUNAL

The Tribunal heard the oral testimony of 25 witnesses and of six experts in various branches of law and public administration, and read a large number of affidavits of other witnesses ; it further received a considerable number of exhibits put in by the Prosecution and containing some 140 volumes of documentary evidence, 11,000 typed pages of Hans Frank's memoirs, and 3,750 page collection of the German Official Gazette for the General Government.

The facts established by the Tribunal may be summarised under the following headings :

(i) *Nazi Policy Towards the " Government General "*

The general policy of Nazi Germany in regard to this part of Poland and its population was more or less similar to that set out for the territories incorporated into the Reich.[1] This policy was part and parcel of a plan directed at the establishment in the East of a German *Lebensraum*, a plan which in its final stage aimed at depriving these territories of its Polish element. The elimination of so many million people was, of course, not an easy task and, therefore, the plan had to be carried out in stages.

Already at the very outset of the German occupation of Poland, Hitler issued on 17th October, 1939, the following directives to his subordinates who had been entrusted by him with the implementation of that policy in the Government General :

(*a*) The economy and finance of these territories should not be reconstructed in any ordinary sense of the term ;

[1] See *Trial of Artur Greiser*, Case No. 74, pp. 96-99 of Vol. XIII.

(*b*) The Polish territories shall be organised as a military jumping-board of Germany ;

(*c*) All Poles and Jews deported from Germany and from the incorporated territories shall be concentrated in the Government General ;

(*d*) The Polish intelligentsia shall not be allowed to lead the Polish nation ;

(*e*) All foundations and nuclei of Polish national consolidation shall be destroyed ;

(*f*) The Poles should be forced down to the lowest standard of living and be allowed only the minimum necessary for the sustenance, so that they become a source of cheap labour for Germany ;

(*g*) No legal restrictions should impede this national struggle.

The implementation of these directives, very general as they were, was entrusted by Hitler to Dr. Hans Frank as Governor-General and to his deputy, the accused Dr. Joseph Buhler.

On 26th October, 1939, on the day of his installation to the office, Hans Frank issued a proclamation to " Polish men and women," of which the following passages may be quoted as illustrating the German policy set out above. He said :

" . . . In conformity with German interests and within the limits of those interests, the creation of the ' Government General ' marks the end of a historical episode, the responsibility for which entirely falls on the deluded clique of the Government of the *former* State of ' Poland,' and the hypocritical warmongers of Britain. The advance of the German troops has restored order in the Polish territories ; a new menace to European peace, provoked by the unjustified exactions of a State built upon the imposed peace of Versailles, *which will never revive*, has thus been eliminated for ever."(1)

After some reference to the neighbourly relations between the Poles and the German nation, he further stated :

" *Liberated* from the constraint exercised by the adventurous policy of *your intellectual governing class*, you must do your best to fulfil *the duty of general labour* and you will fulfil it under the powerful protection of Greater Germany. All will earn their bread by working under an equitable rule, but *there will no longer be any room* for political instigators, shady profiteers and *Jewish exploiters* in the territory that is under German Sovereignty.

" Any attempt to oppose the promulgated laws and order in the Polish territories will be crushed with merciless severity by the powerful arms of Greater Germany."(1)

(ii) *The German New Order*

The Government General was established by the Führer's decree of 12th October, 1939, which came into force on 26th October, 1939. The Governor General had the title of and actually was a Reich Minister and was responsible directly to the Führer. The headquarters of the government was in Cracow. According to the decree, Polish laws were to remain in force

(1) Italics introduced.

but only " in so far as they were not contrary to the taking over of the administration by the German Reich " (Art. 4). The Ministerial Council for Reich Defence, the Commissioner for the Four Year Plan and the Governor-General were empowered to legislate by decree (Art. 5). These and other Reich authorities were also empowered to issue laws required for the planning of the German living and economic space in respect of the territories subordinated to the Governor-General (Art. 6). The central power for these territories was the Reich Minister for the Interior, who had the authority to issue legal and administrative regulations necessary for the execution and supplementation of the decree (Art. 8).

Following the implementation of a decree issued by Frank on 26th October, 1939, and concerning the organisation of the administration of the Government-General, the office of the headquarters in Cracow was divided into six departments : chancellery, legislation, local administration, personnel, organisational matters, business, and fifteen divisions (finance, economy, interior, labour, agriculture and food, justice, enlightenment and propaganda, foreign exchange, education, health, building, forestry, post, railroads, and trustee property administration). In addition there were liaison offices for relations with the army and with the administration of the Four-Years Plan. The Chief of the Governor-General's office, and the High S.S. Commandant and Chief of Police were directly subordinate to the Governor-General and his deputy ; the Commandant of the ordinary police and the Commandant of the security police having been in turn subordinated to the first mentioned. More or less similar administrative structure was built up in the offices of the district-governors.

By a decree promulgated on 1st December, 1940, the Office of the Governor-General assumed the name and functions of the Government of the General-Government, and consequently the Chief of the Governor-General's Office became Secretary of State of the Government-General. Both these functions were held in turn by the accused.

The Government-General was originally divided into four districts : Cracow, Warsaw, Radom, and Lublin ; and after the occupation of Lwow in 1941 (up to which time it had been held by the Russians), an additional district was formed consisting of Lwow and Eastern Galicia. Each district was under a district-governor. The districts were divided into counties and municipalities, the administration of which was in the hands of mayors appointed by the Governor-General or the district-governors. Directly subordinate to the district-governors were the S.S. and Police Commandants.

On the basis of the regulations set out above and of the evidence put in before the Tribunal, the latter established that the administration of the Government-General was organised in accordance with the *Führerprinzip* and based on full co-operation and interdependence of the administrative and police authorities on all levels. It may be added that the Governor-General was at the same time head of the N.S.D.A.P. of the territory and that the great majority of higher German officials there were members of the Nazi Party. The Tribunal found also that this complex organisation of the German authority was being exercised only in the interests of the Reich and in complete disregard of the interests and rights of the local inhabitants, and was particularly directed at the extermination of the Polish and Jewish population.

The German policy and its implementation found also an expression in the legislative sphere and in the organisation of the administration of justice. As already indicated, apart from the central authorities of the Reich, the Governor-General had full authority to enact legislation and on his authorisation such powers had also been vested in the High S.S. Commandant and Chief of Police.

Frank's decrees(1) laid down that there were to be in the Government-General German and Polish Courts. The decree stated that the task of the German Courts was to deal with cases where attacks on the security and dignity of the German Reich and people, as well as on the life, health and property of German nationals were involved. This jurisdiction of the German Courts applied however not only to German nationals but to all other "persons" in so far as the latter were not already subject to German criminal jurisdiction of Special Courts. All cases were judged and proceeded with according to German law. There were of course some exceptions : a defending counsel was to be appointed only if it appeared expedient, and private prosecution was not admissible.

German Special Courts and Summary Police Courts were established by the decrees of 31st October and 15th December, 1939, in all districts, their jurisdiction insofar as the Poles were concerned having been defined in every type of cases by orders and regulations promulgated by the Governor-General. For example, they tried cases involving offences against the confiscation of private property or against the discriminating measures enforced against Jews, etc. In most cases these courts applied the penalty of death or of deporting to concentration camps ; they were part of the German machinery for extermination of people.

Polish criminal jurisdiction was allowed only insofar as the competence of German courts did not apply. Cases for trial before Polish courts were being allocated by a German prosecuting authority ; and final decisions of these courts could have been revised by German judges, who were empowered to cancel the decision and refer the case to a German court. The provisions of Polish law whereby the Polish courts were entitled to defer the execution of penalties involving loss of liberty, or fines, or to exercise mercy were made invalid.

The Polish courts were under direct supervision of the district-governors. The re-employed former Polish judges and clerks were obliged to make a written declaration to the effect that they will carry out their duties in administering the law in obedience to the German administration.(2)

Following the findings of the Tribunal, the considerable mass of orders and regulations enacted by the German authorities of the Government-General can be divided into several groups, according to the various groups of crimes for the commission of which these measures were intended to serve as a seemingly legal basis.

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(1) Reference is made to : (*a*) Decree of 26th October, 1939, concerning the Organisation of the Administration of Justice in the Government General ; (*b*) Decree of 9th February, 1940, concerning German Jurisdiction in the Government General ; and (*c*) Decree of 19th February, 1940, concerning Polish Jurisdiction in the Government General.

(2) For other provisions of the criminal law enacted for the Government General, see Case No. 35, *The Justice Trial*, in Vol. VI of these Law Reports, pp. 10-14.

(a) Systematic Terrorism

Apart from the general powers vested in the High S.S. Commandant and Chief of Police and which were necessary to enforce order and security in the territory, most relevant in this connection was the order of 31st October, 1939, " concerning the combating of acts of violence," and the order of 2nd October, 1943, " concerning the combating of attempts against the German work of reconstruction."

These two measures coupled with the manner in which the Police Summary Courts were functioning, resulted in a great number of murders, tortures, ill-treatment, plunder, deportation, etc. The acts which came within the scope of these orders were punished only by death or deportation to concentration camps.(1)

Of the other regulations which did not provide for the death penalty, but nevertheless were very severe and resulted in most cases in deportation to forced labour or concentration camps, were, for instance : the order of 3rd April, 1941, " concerning the eviction of Poles from flats and houses " ; the order of 19th February, 1943, " concerning the curfew " ; and the order of 18th October, 1943, " concerning the prohibition to use public transport by non-Germans."

(b) Slave Labour

In this respect the regulations of 26th and 31st October, 1939, and of 14th December, 1939, contained some characteristic provisions.

All Polish inhabitants between the ages of 18 and 60 were subject to compulsory public labour. The latter comprised, in particular, work in agriculture concerns, the building and maintenance of public buildings, the construction of roads, waterways and railways, the regulation of rivers and land work.

The regulations laid down that wages of persons subject to compulsory labour " shall be fixed at rates that may appear to be fair " ; and that the welfare of such persons and their families, " shall be secured as far as possible."

The district-governors were entitled to regulate the conditions of labour by ordering tariffs, and were authorised to extend compulsory labour to juveniles between 14 and 18 years.

Compulsory labour was also introduced for all Jews domiciled in the Government-General, *i.e.*, including those who were deported into the territory from other European countries. The Jews were for this purpose formed into forced labour battalions.

At the same time special disciplinary measures were introduced for punishing without trial of all infractions ; they provided even for the death penalty and deportation to penal camps.

(c) Extermination of Jews

Measures relating to this subject have already been presented in connection with another Polish trial reported upon in Volume VII.(2)

(1) For the presentation of crimes committed in concentration camps and ghettos see Case No. 37, *Trial of A. M. Goeth*, and Case No. 38, *Trial of R. F. F. Hoess*, in Vol. VII of this series.

(2) See Case No. 38, *Trial of Amon M. Goeth*, Vol. VII, pp. 2-4.

(d) Measures Against Polish Culture and Education

Education had been completely reorganised. It was controlled by a special department of the Governor-General's office in Cracow and by corresponding sections created under the district-governors.

The officials of the school administration must have been Germans, although the educational councils could appoint Poles as school supervisors.

Only trade and professional schools had been re-established for Poles. This was in line with the general policy of preparing Polish youth for physical work and to develop technical skill in compliance with the general plan to use the Polish population mainly as a source of manpower. Polish curriculum had been substantially restricted.

All universities and schools of art were closed. Libraries, laboratories, and art galleries, as well as paintings belonging to private individuals, were seized and carried to Germany. Relevant in this latter connection was the decree of 16th December, 1939, concerning the sequestration of works of art.

Instead, in 1940, the Governor-General opened, at the premises of the closed university of Cracow, an Institute for German Work in the East (*Institut für Deutsche Ostarbeit*). Its main task was to do German research work in actual problems of the Government-General. The Governor-General stated in his opening speech that " the establishment of the Institute means the resumption of the historical mission that Germanism is to fulfil in this place " and the " restitution of all that which the Poles took away from the German spirit and German influence in this territory."

The regulations of 26th and 31st October, 1939, laid down that no newspapers and periodicals of any kind and no printing works could be set up without special licence. In consequence, the whole Polish press was eliminated, and only those papers were allowed which carried German propaganda.

By order of 23rd August, 1940, all Polish organisations and associations were disbanded and new ones prohibited.

(e) Confiscation of Public and Private Property

By the decree of 15th November, 1939, issued by Frank, the entire movable and immovable property of the " former Polish State " within the Government-General, together with all accessories, and including all claims, shares, rights and other interests was sequestrated. The seizure, administration and realisation of the sequestrated property was incumbent on the Department of Trustees (*Treuhandstelle*) in the office of the Governor-General. This department was entitled to demand information from anyone for the execution of the decree. Those who refused information or imparted it in a false, incorrect or incomplete manner were subject to imprisonment or an unlimited fine, or both. Trial was within the competence of Special Courts (*Sondergericht*).

On 24th January, 1940, Frank issued yet another decree which concerned sequestration of private property. While the analogous decree issued in the incorporated territories had as the chief reason for confiscations and sequestrations the " strengthening of Germanism,"[1] the decree issued by Frank

[1] See Case No. 74, *Trial of Artur Greiser*, Vol. XIII pp. 78-9.

stated that confiscation or sequestration could be ordered in connection with the carrying out of tasks " serving the public interest." For instance, private property could have been seized because it was " financially unremunerative " or " anti-social." Since the occupant had the right to define these and similar terms, he had likewise the opportunity to use the decree for purposes of war and political pressure. As sequestration of private property in the Government-General was a mass phenomenon, the administration of the property seized was also entrusted to the Treuhandstelle, which employed thousands of so-called trustees to manage the property. The decree provided that when the trustees took over, the rights of third parties in the sequestrated property became suspended. On the other hand, the trustees could claim debts owed to the property by third parties.

By this decree, so-called abandoned property, *i.e.*, of people who left the country owing to the circumstances of war or had been deported, and of Jews, was also seized. As a weapon for political purposes, the director of the Trustee Administration was given the power to decide in each individual case whether compensation should be granted for losses arising from the implementation of the decree, although legal processes were precluded. This provision meant in effect that the interested person could always hope to get some compensation in consideration for services to the occupant.

Similar decrees were enacted in regard to the mining rights and mining shares (14th December, 1939), surrender and confiscation of wireless sets (15th December, 1939), and the sequestration of installations and equipment of the mineral oil industry (23rd January, 1940).

(f) Economic Exploitation

A clear illustration of the German economic policy in the Government-General is provided by a strictly confidential circular issued on 25th January, 1940, by Frank under the authority of Goering as Commissioner for the Four Year Plan. The object of this policy was to exploit to the utmost the resources and productive forces of the occupied country. But its aims extended far beyond the limits of the immediate benefit and material gain, and was designed to create a powerful war machine.

The general part of the circular's directives " for the execution of the task of systematically placing the economic power of the Government-General in the service of German war economy within the framework of the Four Year Plan " reads as follows :

> " 1. In view of the present requirements of the Reich's war economy, no long term economic policy must, in principle, be carried on in the Government-General for the time being. On the contrary, the economy of the Government-General must be so directed that it should within the shortest possible time produce the maximum of that which it is possible to raise out of the economic resources of the Government-General for the immediate reinforcement of the Reich's military power.
>
> " 2. The following contributions, in particular, are expected from the economy of the Government-General as a whole :
>
> " (*a*) Intensification of agricultural production, particularly in the case of large estates (more than 100 hectares) and planned distribution of the foodstuffs, which are to be registered, in order to ensure the

needs of the troops, military organisations and service organs, as well as the indigenous population, which are not yet entirely covered by the present production.

" (*b*) The utmost exploitation of the forests, regular forest economy being temporarily interrupted, with a view to supplying to the Reich approximately 1 million cubic metres of sawn timber, 1.2 million cubic metres pit props, and up to 0.4 million cubic metres pulp wood.

" (*c*) Increase of raw material production in the industrial sphere, particularly :

in connection with the production of iron ores and pyrites to cover the requirements of the blast furnaces worked in the Government-General itself ;

in connection with the extraction of crude oil, to cover the most important requirements of the Government-General from the viewpoint of war economy, and to export the largest possible quantities to the Reich ;

in the chemical industry (nitrogen, phosphates), in order to ensure such supplies of manure for agriculture as may be covered in the Government-General itself.

" (*d*) Exploitation and if necessary partial extension of the Government-General's existing industrial capacity for the purpose of the most rapid execution of armament orders to be placed by the Reich in the Government-General, production of products which are vital for the operation of the Government-General's industrial apparatus even under the most rigid standards, being maintained.

" (*e*) Maintenance of the productive capacity of concerns which, though not yet allotted any armament orders, shall be selected as refuge concerns for works important to the war effort which have been or are to be evacuated from the Reich.

" (*f*) Elimination and breaking up of industrial premises which are neither converted into armaments works, nor declared as refuge works, together with the destroyed buildings.

" (*g*) Preparations and transportation into the Reich of not fewer than one million male and female agricultural and industrial workers —including approximately 750,000 agricultural workers, at least 50 per cent of whom must be women—in order to safeguard agricultural production in the Reich and supply the deficiency of industrial labour in the Reich.

" 3. In order to achieve the expected contribution, provision should be made :

" (*a*) to complement the measures of organisation designed to increase agricultural production and restore the stocks of cattle which have considerably diminished owing to the war, by ensuring the supply of seeds and fertilisers, if necessary through importation from the Reich ; by adequate provision of agricultural machinery produced in the Government-General ; by systematic development of water economy, simultaneously extending to the requirements of the waterways and power supply ;

" (*b*) to prohibit in the sphere of forestry all uneconomic use of timber and ensure the despatch of the quantities to be supplied to the Reich ;

" (*c*) to ensure, in connection with the intensification of raw material production :

the financing,

through the thorough exploitation of the credit apparatus existing in the Government-General ;

the acquisition of the necessary extracting and drilling apparatus, and the provision of the workers with the food and clothing indispensable to maintain their full working capacity ;

and transportation, particularly of mineral oil, to the Reich ;

" (*d*) to see that when the industrial capacity of the Government-General is covered with armament orders from the Reich, the following shall be consistent :

kind and extent of orders ;

location and capacity of works ;

raw material requirements and supply—if possible from stocks of raw material available in the Government-General ;

labour requirements and supply ;

transport facilities for raw material and finished goods ;

preliminary financing of wages in the Government-General and transfer of proceeds from the Reich ;

" (*e*) to compile a precise register of the concerns required for the execution of armament orders, those continuing to provide the Government-General with absolutely vital products, those maintained as refuge works, and those to be eliminated and razed, the starting or continuance of works to be uniformly regulated and to be made dependent on a permit ;

" (*f*) to ensure the supply of Polish labour required for the Reich by :

causing the Labour Offices to bring the levying into harmony with the labour requirements of the Government-General ; effecting despatch so early that the transports may be completed in the course of April ;

by arranging for the transfer of the wage-savings of workers who come to the Reich solely as itinerant casuals.

" 4. In order to accomplish the uniform adaptation of the entire economy of the Government-General for the present incumbent tasks, the following further measures shall be taken :

" (*a*) In connection with the food supply for the population it must be attained at all costs that people engaged in concerns of vital or military importance shall maintain their efficiency, while the rest of the population shall during the food shortage be reduced to a minimum of food ;

" (*b*) All production based on raw materials of military importance, but relating to objects which are not absolutely vital within the frame-

work of the present Plan, must be ruthlessly prohibited, unless it is possible to deflect it to raw materials and other products available in adequate quantities (*e.g.*, production of wooden clogs, production of leather shoes and boots for the indigenous population being prohibited). For the rest, the raw material saving regulations and the prohibitions and rules relating to production and application which are in force in the Reich must also be enforced in the Government-General, at least to the same extent ;

" (*c*) The despatch of raw materials to the Reich is to be limited to the quantities which are not absolutely necessary in the Government-General to secure the production important to war economy. The right of disposal over the raw materials, semi-manufactured and finished products existing in the Government-General, is reserved for your Office. For the better regulation of supplies small quantities of valuable raw materials from the concerns that are to be eliminated and from small warehouses are to be collected at a central warehouse ;

" (*d*) The supply of concerns important to war economy with coal and the supply of the population's most urgent requirements of household coal is to be secured by agreement with the competent Reich authorities ;

" (*e*) Collection of leather, waste material and scrap must be systematically pursued. In view of the special conditions existing in the Government-General, Jewish dealers may also be employed in this connection, and may for this purpose be relieved of forced labour, etc. ;

" (*f*) In order to adapt transport requirements and transport facilities to each other and work out a preferential scale, a transport plan must be arranged in consultation with the transport authorities, and all further planning must be based thereon ;

" (*g*) The regulation of prices and wages, the safeguarding of currency and also credit policy must be harmonised with each other, in order to create stable conditions as the indispensable basis of all economic planning ;

" (*h*) In order to obtain a survey of the probable development of mutual payments between the Reich and the Government-General, a payments account must be drawn up as soon as it is possible to estimate to what extent armament orders from the Reich can be carried out in the Government-General."

In order to achieve the expected contributions, the circular further directed to make specific provisions which were to be extended to all spheres of economic activities. This was duly followed by a great number of regulations which implemented the measures set out above.

(iii) *The Personal Responsibility of the Accused*

The decrees and regulations enumerated or quoted in the preceding sections just to illustrate the general pattern, constituted in the view of the Tribunal incontrovertible proof that the legal new order introduced by the Germans in the Government-General was in itself contrary to all long established principles and rules of international law. As already indicated,

it gave rise in fact, as was intended, to mass criminality indulged in by German officials and functionaries against the individuals, and the Polish and Jewish nations as a whole.

In judging the criminal responsibility of the accused Buhler, the Tribunal had not only to view it in the light of these legal enactments, but actually analysed it at much length also against the background of the role and activities of his immediate superior and leader, Hans Frank. In this respect it will be convenient to quote here a few passages from the Judgment of the Nuremberg Tribunal by which Frank himself was judged and sentenced to death, and with which the findings of the Polish Supreme National Tribunal are entirely in line. The Nuremberg Tribunal said :

> " On 3rd October, 1939, he [Frank] described the policy which he intended to put into effect by stating : ' Poland shall be treated like a colony ; the Poles will become the slaves of the Greater German World Empire.' The evidence establishes that this occupation policy was based on the complete destruction of Poland as a national entity, and a ruthless exploitation of its human and economic resources for the German war effort. All opposition was crushed with the utmost harshness. A reign of terror was instituted, backed by summary police courts which ordered such actions as the public shootings of groups of twenty to two hundred Poles, and the widespread shootings of hostages. The concentration camp system was introduced in the General Government by the establishment of the notorious Treblinka and Maydanek camps. As early as 6th February, 1940, Frank gave an indication of the extent of this reign of terror by his cynical comment to a newspaper reporter on von Neurath's poster announcing the execution of the Czech students : ' If I wished to order that one should hang up posters about every seven Poles shot, there would not be enough forests in Poland with which to make the paper for these posters.' On 30th May, 1940, Frank told a police conference that he was taking advantage of the offensive in the West which diverted the attention of the world from Poland to liquidate thousands of Poles who would be likely to resist German domination of Poland, including ' the leading representatives of the Polish intelligentsia.' Pursuant to these instructions the brutal A.B. action was begun under which the Security Police and S.D. carried out these exterminations which were only partially subjected to the restraints of legal procedure. On 2nd October, 1943, Frank issued a decree under which any non-Germans hindering German construction in the General Government were to be tried by summary courts of the Security Police and S.D. and sentenced to death.
>
> " The economic demands made on the General Government were far in excess of the needs of the army of occupation, and were out of all proportion to the resources of the country. The food raised in Poland was shipped to Germany on such a wide scale that the rations of the population of the occupied territories were reduced to the starvation level, and epidemics were widespread. Some steps were taken to provide for the feeding of the agricultural workers who were used to raise the crops, but the requirements of the rest of the population were disregarded. It is undoubtedly true, as argued by counsel for the defence, that some suffering in the General Government was inevitable

as a result of the ravages of war and the economic confusion resulting therefrom. But the suffering was increased by a planned policy of economic exploitation.

" Frank introduced the deportation of slave labourers to Germany in the very early stages of his administration. On 25th January, 1940, he indicated his intention of deporting one million labourers to Germany, suggesting on 10th May, 1940, the use of police raids to meet this quota. On 18th August, 1942, Frank reported that he had already supplied 800,000 workers for the Reich, and expected to be able to supply 140,000 more before the end of the year.

" The persecution of the Jews was immediately begun in the General Government. The area originally contained from 2,500,000 to 3,500,000 Jews. They were forced into ghettos, subjected to discriminatory laws, deprived of the food necessary to avoid starvation, and finally systematically and brutally exterminated. On 16th December, 1941, Frank told the Cabinet of the Governor-General : ' We must annihilate the Jews wherever we find them and wherever it is possible, in order to maintain there the structure of Reich as a whole.' By 25th January, 1944, Frank estimated that there were only 100,000 Jews left.

" At the beginning of his testimony, Frank stated that he had a feeling of ' terrible guilt ' for the atrocities committed in the occupied territories."(1)

After having made references to the defence submitted by Frank, the Nuremberg Tribunal concluded its statement in the following words :

" . . . Frank was a willing and knowing participant in the use of terrorism in Poland ; in the economic exploitation of Poland in a way which led to the death by starvation of a large number of people ; in the deportation to Germany as slave labourers of over a million Poles ; and in a programme involving the murder of at least three million Jews."(2)

As stated previously, the accused Buhler was not only Frank's deputy in the sphere of policy making, but also his principal aid in supervising and directing the entire civil and legal administration in the Government-General. In the words of the Polish Tribunal, Buhler was a type of war criminal who did not directly commit any common crime himself, but one who sitting comfortably in his cabinet office, took part in the commission of war crimes and crimes against humanity by directing and supervising the actual perpetrators, and by providing them with the useful instrument of administrative and legal measures ; he was the chief engineer of the complicated and widespread criminal machinery, who guided thousands of the willing tools in how to use it.

In his manifold official capacity, Buhler regularly took part in the meetings of the Government-General's cabinet, and in drafting and approving laws and orders, especially those which resulted in deportation, persecution and extermination of people, and had a detailed knowledge of how all these measures were being put into practice. Innumerable instances illustrating

(1) The Nuremberg Judgment, His Majesty's Stationery Office, Cmd. 6964, pp. 97-98.
(2) *Ibid.* p. 98.

these criminal activities of the accused are provided for in the findings of the Tribunal. One instance, in particular, may be referred to here in more detail.

On 20th January, 1942, a conference took place in Berlin, in the Reich Security Office, under the chairmanship of S.S. Obergruppenführer Heydrich. It was attended by representatives of several ministries and other central offices, and by the accused Buhler. As recorded in the minutes, it was decided at this meeting to deport all Jews from the Reich to the General Government where they had to be liquidated. During the discussions Buhler stated that the Cabinet of the Government-General shall welcome such a solution of the Jewish problem which involved also about three million Jews in that territory, and that the necessary action will be supported by all German authorities there. He asked only for one thing, namely, that the actions should be put into effect speedily and, if possible, " without unduly disturbing the local population." At this conference an outline of putting into effect the general plan for the extermination of Jews in the occupied territories was also discussed.

On his return to Cracow, the accused himself issued the necessary orders and instructions for the implementation of the above decision. Similar attitude was displayed by Buhler in connection with the setting up of the special summary police courts in the Government-General. This attitude showed that Buhler was rather in favour of inconspicuous and seemingly legal measures, but none the less equally effective. The Tribunal stated in this connection that even if there were no other proofs of the criminal activities of the accused, this personal participation of his in the extermination of the Jews would be sufficient for his conviction. However, there was ample evidence as to other criminal activities in the Government-General of which he knew well enough and for which he was responsible.

After having studied the German Official Gazette published in the General Government for the years 1939-1945, the Tribunal established that a great majority of the laws, orders and regulations contained therein were in violation of the rights of the inhabitants and contrary to international law. Most of these enactments were signed by Frank, and 112 of them by the accused Buhler. Many of the enactments provided for heavy punishments including the penalty of death. To this latter category belong, for instance, those which concerned : the duty laid upon all former Polish army officers to report to the German authorities ; the improper use of uniform ; possession of arms ; restrictions as to residence ; the setting up of separate quarters for the Jewish population ; forced labour ; control of prices ; confiscation of wireless apparatus ; use of cars and motor cycles ; collections for the *Winterhilfe* ; the trading in poison ; protection of forests and game ; protection of war economy, etc. According to these provisions the jurisdiction for applying the death penalty rested with the summary police courts or with the Special Courts.

Apart from having signed himself and promulgated a number of enactments of the type indicated above, the accused was also responsible for taking part in the preparation of all legal measures published in the Official Gazette, whether they were signed by Frank or by the accused himself. In particular, he was supervising the drafting of these measures, taking part in conferences and discussions over such drafts and, finally, giving his final consent in

writing for the texts to be submitted to Frank for signature. He was thus responsible not only for the formal and technical side of the whole legislative procedure, but also for the substantive law embodied in the enactments.

As already stated, the legal measures enacted by the German authorities in the Government-General with full knowledge and participation of the accused resulted in many murders and other crimes. The Tribunal was, of course, not in the position to establish how many such crimes had been committed, but stated generally that many thousands of innocent people lost their lives or were put to death, or were otherwise punished, for deeds which were not criminal according to Polish municipal law and international law. All these measures resulted also in general persecutions of Polish citizens and in the extermination of hundreds of thousands of the Jewish population.

In regard to the accused's participation in other criminal activities, the Tribunal established, *inter alia*, the following :

(*a*) As has already been mentioned, in May, 1940, a so-called action A—B was initiated (Ausserordentliche Befriedungsaktion) and which aimed at the extermination of the Polish intellectual classes. In this connection two governmental conferences took place in Cracow on 16th and 20th May, 1940. The accused took part in these meetings and gave full support to Frank on this issue.

(*b*) By an order of 20th December, 1941, Governor-General Frank transferred his prerogative of mercy to the district-governors in all cases where the Jews had been sentenced to death for having escaped from ghettos. In a special circular dated 12th January, 1942, the accused Buhler instructed all the governors that Frank's order shall be understood in the sense that appeals for mercy should as a rule be rejected by them ; in exceptional cases where clemency should in their view be granted, they should refrain from deciding upon it themselves and submit the cases for Frank's decision. By these instructions the accused prevented the governors from exercising the prerogative of mercy in favour of the Jewish victims.

(*c*) By ordinances of 18th May, 17th August and 17th September, 1944, the accused introduced compulsory work for the Polish inhabitants on military works and establishments. The first of these ordinances permitted as a means of compulsion, *inter alia*, the imposition of contributions on the whole cities and towns. Such a contribution of ten million zlotys was in fact imposed, for instance, on the population of Warsaw in February, 1943.

(*d*) The accused was responsible for having issued various measures in connection with the confiscation of movable property left by the exterminated Jews or by the Jewish population expelled from their places of residence. He was also responsible for preparing in advance all plans for expulsion and deportation of Poles from specific towns and districts (orders dated 16th December, 1941, and 7th October, 1942).

(*e*) On the 12th February, 1940, the accused circulated the Goering-Frank circular of 25th January, 1940 (see paragraph (*f*) of Section (ii) above) together with instructions for the district-governors and heads of offices as to the implementation of measures relating to the Four-Year Plan in the Government-General.

(*f*) By an appropriation of 24th November, 1939, the accused Buhler provided the office of Dr. Mühlmann with the necessary funds for covering expenses in connection with the removal from the Government-General of art treasures and scientific equipment.

(*g*) On instructions issued by Buhler on 22nd August, 1940, the names of many streets and places had been changed for German denominations or provided with entirely new German descriptions.

There are in all 22 instances of similar matters enumerated in the judgment and for which the Tribunal held the accused personally responsible.

4. THE CASE FOR THE DEFENCE

The accused, who was defended by counsel appointed by the Tribunal, pleaded not guilty. His general line of defence was the following.

The accused admitted that he was a member of the Nazi Party and had held the highest official positions in the government of the occupied Polish territory as mentioned in the Indictment. He denied, however, that he had any knowledge of the criminal aims of these organisations. This plea was rejected by the Tribunal as unfounded and incredible in the light of the facts and evidence established during the trial.

The defendant further admitted that he had signed a number of the laws and decrees promulgated in the Official Gazette, but defended himself by alleging that he did so on express orders of Frank and without having realised the criminal character of these enactments. He was not sufficiently acquainted with the principles of the laws of nations and was satisfied that in view of the subjugation of Poland the legislative activities of the German authorities in the Government-General were not subject to any restrictions. In rejecting this plea, the Tribunal based itself on para. 1 of Article 5 of the Decree of 10th December, 1946, which provides that " The fact that an act or omission was caused by a threat or order, or arose out of obligation under municipal law does not exempt from criminal responsibility."[1] The Tribunal referred also in this connection to Article 8 of the Charter of the International Military Tribunal,[2] and added, as regards the second part of his plea, that the accused was a doctor of laws and must have had therefore sufficient knowledge of the rights and duties of an occupying power as laid down by international law, and of the general principles of criminal law, common to all civilised nations.

As regards the general practice of his having first approved of and endorsed almost all the laws, decrees and orders before they had been submitted to Frank for his signature, the accused submitted that this could not have any bearing on his responsibility for them. In fact, he alleged, all these enactments were prepared and drafted by the appropriate legal department of the Frank's cabinet, for which the responsibility rested solely with the respective departmental head, and his, the accused's, participation was restricted to a mechanical formality which he most frequently discharged without having read their contents. It often also happened that the endorse-

[1] See p. 88 of the Annex to Vol. VII of the Law Reports.

[2] Article 8 reads : " The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires."

ments were given by him only after the acts had been signed by Frank. The Tribunal rejected this submission in view of the facts established by the evidence before it, which showed that the accused personally and actively exercised a decisive influence and supervision over the whole field of legislative activities of all the governmental departments, and also because during the trial the accused proved himself thoroughly acquainted with all legal measures enacted during his period of office. From this responsibility the accused could have been exempted only if he showed that he had refused to approve and endorse those legislative acts which were contrary to international law. The Tribunal was however not in possession of one single item of proof that such a course was ever taken by the accused, or that he at any time was opposed to any of such acts.

Finally, the accused submitted that the decree of 31st August, 1944, was not applicable to him in view of the fact that the accused was himself one of the two highest representatives of the German authorities of occupation, while this decree provided only for punishment of persons who assisted such authorities in the commission of crimes. This plea could not, however, be upheld as, according to Article 3, para. 6, of the Polish Criminal Code, the Polish criminal law is applicable to all persons, irrespective of their nationality, who committed crimes on the territory of the Polish State.(1)

Jointly with the above plea, the accused also submitted that the acts committed by him were acts of State, for which he could not be held responsible as otherwise this would be contrary to international law. The Tribunal rejected this plea and referred in this connection to Article 7 of the Charter of the International Military Tribunal of 8th August, 1945, which provides that the " official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment."(2)

5. THE VERDICT AND SENTENCE

The Supreme National Tribunal found the accused Joseph Buhler guilty of the crimes with which he was charged in the Indictment, and sentenced him to death. In addition, the Tribunal pronounced the loss of public and civic rights, and forfeiture of all property of the accused.

B. NOTES ON THE CASE

1. THE COURT AND THE LEGAL BASIS OF THE TRIAL

As already indicated, the Court was the Supreme National Tribunal established for trial of war criminals, who, " in accordance with the Moscow Declaration signed by the United States, the U.S.S.R. and Great Britain, will be surrendered to the Polish authorities." The powers of this Tribunal have been defined in the Decrees of 22nd January, 1946, and 11th April, 1947.(3)

(1) See also the Annex to Vol. VII, *l. cit.*, pp. 82-86.

(2) As to the development in the doctrine of acts of State in international law, see the *History of the United Nations War Crimes Commission and the Development of the Laws of War* (Chapter X, pp. 262-288), published by His Majesty's Stationery Office, London, 1948.

(3) See Vol. VII of the Law Reports, Annex on *Polish Law Concerning Trials of War Criminals*, Part II, Section I, pp. 91-97.

The case was tried in Cracow where the accused exercised his powers as Staatssekretär and Deputy to Governor-General of the occupied Polish territories.

The trial found its legal basis in the decree of 31st August, 1944, on the punishment of war criminals, as amended by the Decree of 16th February, 1945. The consolidated text of those decrees, together with the subsequent changes, have been promulgated in the Decree of 10th December, 1946.(1)

2. THE NATURE OF THE OFFENCES

The acts committed by the accused were crimes in violation of Article 1, para. 1, and Article 2 of the Decree of 31st August, 1944, mentioned in the preceding section.

Inasmuch as the charges contained under (ii) of Section 2 of Part A are concerned, these acts were also in violation of those provisions of the Polish Civil Criminal Code of 1932 which deal with complicity in murder, grevious bodily harm, ill-treatment, and further with infringement of personal liberty, slavery and illegal appropriation of property, and finally with insulting and deriding of national dignity and that of the State (Articles 152, 199, 225, 235, 236, 248, 249, 257-259, 261 and 262), and with instigating, abetting and attempting the commission of such crimes (Articles 23, 26 and 27).

Apart from the provisions of the Decree of 1944 already indicated, the Tribunal based its judgment on the provisions concerning superior orders, and on that providing for additional penalties. The Tribunal also applied the relevant provisions of the Criminal Code which deal with the basic principles of responsibility for criminal acts.

In addition, the Prosecution alleged, and the Tribunal generally accepted that all the acts were war crimes and crimes against humanity in violation of the laws and customs of war as laid down in Articles 43, 46, 47, 50, 52, 55 and 56 of the Hague Convention No. IV.

As regards the charge contained in section 2 (i) of Part A, which deals with the accused's membership in criminal organisations, the legal aspects involved are presented and analysed in detail in section 3 below.

In its judgment, the Tribunal also dealt at some length with such legal questions as: (*a*) subjugation of enemy territory; (*b*) military authority over the occupied territory of the hostile State, and the rights and duties of the belligerent power towards the inhabitants of such territory; and (*b*) with genocide. As the findings of the Tribunal concerning these problems did not bring any new points of interest, the reader is referred to other Polish trials which have been reported upon in the other volumes.(2)

3. OCCUPATION GOVERNMENT AS A CRIMINAL ORGANISATION

The most interesting decision made by the Tribunal in connection with the present trial, is the declaration on the criminal character of the occupation government as a whole. The Tribunal was asked by the Prosecution to

(1) *Ibid.*, Part I, pp. 82-91.

(2) As regards questions under (*a*) and (*b*), see Case No. 74, *Trial of Artur Greiser*, Vol. XIII; and in regard to genocide see the above case and also Cases Nos. 37 and 38, *Trials of A. M. Goeth* and of *R. F. F. Hoess* respectively, reported in Vol. VII.

convict the accused on the count of his membership in the occupation government which, the indictment alleged, was a criminal organisation. This charge and the conviction was based on Article 4, paras. 1 and 2 (*b*), of the already cited Decree of 31st August, 1944, the full text of which reads :

" Para. 1. Any person who was a member of a criminal organisation established or recognized by the authorities of the German State or of a State allied with it, or by a political association which acted in the interest of the German State or a State allied with it—is liable to imprisonment for a period of not less than three years, or for life, or to the death penalty."

" Para. 2. A criminal organisation in the meaning of para. 1 is a group or organisation :

(*a*) which has as its aims the commission of crimes against peace, war crimes or crimes against humanity ; or

(*b*) which while having a different aim, tries to attain it through the commission of crimes mentioned under (*a*)."

" Para. 3. Membership of the following organisations especially is considered criminal :

(*a*) the German National Socialist Workers' Party (National Sozialistische Deutsche Arbeiter Partei—N.S.D.A.P.) as regards all leading positions,

(*b*) the Security Detachments (Schutzstaffeln—S.S.),

(*c*) the State Secret Police (Geheime Staats-Polizei—the Gestapo),

(*d*) the Security Service (Sicherheits Dienst—S.D.)."

The above provisions have been introduced in the consolidated text of the Decree in December, 1946, in order to bring Polish municipal law into line with the developments which, in the meantime, had taken place in international criminal law, in particular, in connection with the London Agreement of 8th August, 1945, and the Judgment of the Nuremberg Tribunal. Therefore, in interpreting the conceptions and notions referred to in Article 4, one would have recourse to these international documents.

From the rule laid down by Article 10 of the Nuremberg Charter(1) it follows that since the ratification of the London Agreement by Poland, whenever a person is tried on a charge of membership in a group or organisation the criminal character of which was under examination of the Nuremberg Tribunal, the Polish Courts are in law bound by the findings of the Tribunal and cannot re-examine the question of the criminal character of the organisation dealt with in the Judgment. Thus, the findings of the Tribunal create for the Polish Court a *praesumptio juris ac de iure* which cannot be invalidated.

On the other hand, it is clear from the law as laid down in para. 2 of Article 4 of the decree that Polish courts are not bound by the fact that

(1) Article 10 of the Charter reads :

" In cases where a group or organisation is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organisation is considered proved and shall not be questioned."

certain other groups or organisations have not been indicted and adjudicated as criminal within the meaning of the Charter. In these cases the Polish court may declare such groups or organisations to be criminal within the Polish jurisdiction. Accordingly, the practice of the Polish Supreme National Tribunal has declared as criminal also some other Nazi groups and organisations which displayed particular zeal in occupied Poland, such as, for instance, members of the concentration camp staff at Auschwitz.(1) This contention and practice is also based on the fact that para. 3 of Article 4 is not exhaustive and the organisations mentioned therein are enumerated only *exempli causa*. The reasons for such an interpretation of Article 4 given by the Tribunal in the Auschwitz case were, *inter alia*, these :

(*a*) The Nuremberg Judgment does not limit the right of the Polish legislator to decide those acts which were not a subject of the findings of the Nuremberg Tribunal and can be considered as liable to punishment within the Polish jurisdiction, unless they have been explicitly declared as not criminal, as, for instance, the acts of the organisation of the S.A.

(*b*) The provisions of the Polish law now in force are not in contradiction to the Nuremberg Judgment. The interpretation of the Polish law cannot be contrary to the explicit text of this Judgment, but on the other hand there is no legal obstacle in the way of supplementing the legal principles established in this Judgment by further principles, if in substance they are not in contradiction with the former.

(*c*) Article 9 of the Nuremberg Charter states that the International Military Tribunal has the power to declare at the trial of any individual member of any group or organisation (in connection with any act of which the individual may be convicted) that the group or organisation of which the individual was a member was a criminal organisation. Thus, Article 9 gave to the Tribunal the power to declare criminal *any* group or organisation, the members of which committed any of the crimes enumerated in Article 6 of the Charter, *i.e.*, crimes against peace, war crimes and crimes against humanity.

(*d*) According to the law laid down in Article 9 of the Charter, an international Tribunal may at any time and at its discretion increase the number of organisations considered as criminal. If therefore, the Charter and the Nuremberg Judgment are both a source of law, of which the former permits any organisation to be declared criminal, and the latter does not prevent this, there is no legal obstacle in the way of declaring, in accordance with Article 4, para. 2, of the Decree of 1944, as criminal some other Nazi groups and organisations.

The case of members of the occupation government is another instance of a Nazi group having been declared criminal.

The question of the criminal nature of the organisation described as occupation government came under consideration of the Polish Supreme National Tribunal for the first time in the trial against Ludwik Fischer, former governor of Warsaw, and against Ludwik Leist, the former's plenipotentiary and later *Stadthauptmann* of the City of Warsaw. In its judgment of 3rd March, 1947, delivered against these two accused, the Tribunal declared the group of persons specified below, and who took part in the

(1) See Case No. 38 already cited, Vol. VII, pp. 20-24.

occupation government in Poland, as a criminal group within the meaning of Article 4, and found both the accused guilty of such a membership.

The following are the reasons which the Tribunal gave in justification of its declaration :

(*a*) There are certain basic moral principles and rules governing international relations which are binding on all nations. Those rules are of a superior order in relation to the laws which may be enacted by individual States contrary to the former, and which cannot be violated without punishment.

The fact that these rules had been violated on a large scale provides Polish courts, in accordance with Article 8 of the Penal Code, with an adequate substantive legal basis for prosecuting the offenders, in cases where their deeds endangered the internal or external security of the Polish State, even if the perpetrators have been of a foreign nationality and committed the offences abroad, irrespective of the law in force in the territory where the acts had been committed.

(*b*) The Polish legislator recognised as criminal, *inter alia*, the following organisations : the S.S., the S.D., the Gestapo and the leadership corps of the Nazi Party, the latter organisation having planned from the very outset aggressive wars and, in accordance with its programme, having aimed at the violation of all rules and customs adopted by all civilised nations.

The Supreme National Tribunal decided that, in addition to the above organisations, the governorship and the top-ranking officials of the German administration of the so-called General Government from the *Kreis* and *Stadthauptmanns* (heads of county and town districts) upwards should also be declared as a criminal group.

(*c*) The Supreme National Tribunal considered that any person who being acquainted with the programme and methods of a party or of another criminal group joined them, did so conscious of the activities of the party or group and approved of them, and thereby undertook to observe statutory obligations to participate, assist and obey and, if in a leading position, to take initiative and act in accordance with the rules and programme of the party or group. Consequently, those who joined such a group accepted full responsibility for its activities.

(*d*) In this connection the problem of superior order as a circumstance which could exclude criminal responsibility becomes irrelevant. For if an individual joined a certain group, which imposes upon him unqualified obedience and discipline, and if he approved of the ideological aims of the group and its methods of action, then he accepted in advance responsibility for the orders which he decided to obey.

Consequently, criminal responsibility of a member is governed not by the circumstance when a criminal order was actually received by him, but by the time of his joining in the party or another criminal group.

(*e*) Crimes committed by groups of people do not diminish, but rather increase the responsibility of members of the group, as such acts are more dangerous than crimes committed by individuals. That is why penal repression in respect of such crimes must be more severe.

Mass crimes, destruction and losses could not have been caused by individuals acting even in large numbers, if the latter were not permeated by one ideology, cemented by one will, and aiming at the same goal. Such criminality can only be the work of groups of people which have properly been selected for the projected tasks and organised, trained and supported by an adequate technical apparatus, executive power and financial means.

(*f*) German officials who, owing to the extent of authority exerted by them, had influence over the conditions of life either on the whole territory of the General Government or in larger areas of the country, should be considered as a criminal group, for they must have been conscious of the criminal aims set out by the highest authority. Such a consciousness could and should be ascribed to the top-ranking officials of the German civil administration in the General Government.

The Supreme National Tribunal considered that to this group should at the least be included all members of the government of the General Government (central office of the General-Governor), all district-governors and their deputies, further all heads of departments and sections in the governors' offices and all heads of lesser districts, *i.e.*, all who were commonly known as the political authority. The degree of knowledge of the ultimate criminal aims might have been different at various levels of this hierarchy, but nevertheless this knowledge was undoubtedly there.

While making the above declaration, the Tribunal was of the opinion that the German administration established by the occupant in the territory of Poland and especially in the former General Government, had not had even a pretence of legality. Hitler and the German Government had maintained that Poland as a State ceased to exist and that, therefore, they were free to act in this territory without waiting for the termination of war or being bound by any rules of international law, and in particular by the Hague Convention of 1907. The Tribunal therefore held that this administration was illegal, and also criminal in view of its aims and actual activities which, the Tribunal found, were, *inter alia*, the following :

(*a*) the establishment of the German sovereignty over this territory,

(*b*) the biological extermination of the entire Jewish population, and partly of the Polish,

(*c*) the ruthless exploitation of the inhabitants of that territory, and of its resources for the needs of the German war effort,

(*d*) the destruction of the cultural values, and of the Polish Nation.

These aims had been in fact gradually put into effect by :

(*a*) the almost complete replacement of the Polish administration by the German offices,

(*b*) the disbandment of Polish organisations and associations, and the prohibition of any new ones,

(*c*) the closing of all secondary, non-technical schools, and of universities, theatres, museums, public libraries and scientific institutes,

(*d*) the exclusion of Polish language, history and geography from the syllabus of all primary and technical schools,

(*e*) pillage and exportation to Germany of Polish property in general, and that of Polish scientific and cultural institutions in particular,

(*f*) the prohibition of publishing of Polish books and periodicals,

(*g*) the introduction of forced labour and slavery,

(*h*) the deportation to Germany of Polish labour,

(*i*) the fixing of the maximum of wages below the minimum necessary for existence,

(*j*) the expropriation or seizure of the great majority of larger Polish undertakings, and of all Jewish enterprises,

(*k*) the removal to Germany of machinery from factories,

(*l*) starvation of the civilian population through insufficient allocations of food,

(*m*) a series of measures tending to lower the dignity and integrity of the Polish and Jewish population, and to demoralise the youth.

The activities of the German administration in the General Government in the spheres enumerated above found their expression in numerous decrees, orders and regulations issued by the German authorities, and carried out by them in a most ruthless manner. It would suffice to mention in this connection that during the occupation of Poland about 4,750,000 people have been put to death in various ways and the fate of 1,700,000 is unknown, and that the material losses amount to many million pounds, not to mention other irreparable losses which can never be assessed.

As regards the question of participation of various heads of the German offices and departments of the administration in the group thus declared criminal, the Tribunal based itself on the decrees and regulations relevant to the organisation of the German administration in the General Government.

In the opinion of the Tribunal, all German top-ranking officials can be brought to trial for membership in the group defined above, who participated therein voluntarily and were conscious of the aims and activities, no matter whether they were, or not, at the same time members of the Nazi Party (N.S.D.A.P.). Their simultaneous membership in the latter, especially on leading positions, would constitute only a presumption as to their guilty knowledge and would make irrelevant the question whether they took up the leading administrative posts voluntarily or upon orders.

In the present case against the accused Buhler, the Tribunal took into consideration the fact that the criminal nature of the group of persons under discussion had already been proved in the trial of Ludwik Fischer *et al.*, and having also taken into account some additional evidence established in this case, found the accused Buhler guilty on the count of membership in the occupation government which was previously declared by this same Tribunal as a criminal organisation. The Tribunal added that, considering his high position, there could be no doubt that the accused had perfect knowledge of the criminal aims of that government, as it was in fact established during the trial. Therefore, the accused had to bear the responsibility for all criminal acts, whether committed by himself as one of the leaders, organisers, instigators and accomplices who participated in the formulation or execution of a common plan or conspiracy to commit such acts, or committed by his subordinates in execution of such plan.(1)

The declaration of the Polish Tribunal is illustrative of State legislation and

(1) Compare with Article 7 (last paragraph) of the Charter of the International Military Tribunal.

practice of some of the Allied countries which, in view of the different circumstances and of the extent of Nazi criminality in the respective territories under German occupation, tended to include among the criminal groups and organisations some other besides those which had been considered or declared as such by the Nuremberg Tribunal.(1) As already indicated this practice does not run counter to the rules laid down by international criminal law as it has been developed by the Charter and it constitutes a further contribution to the retributive action enforced by the Allied Nations against war criminals, and seems justified by the unique position of the States in question among the most persecuted countries.

As far as is known, there is however no precedent or any other example of declaring an occupation government as a criminal organisation. The fact that the Polish Tribunal thought it justified to establish such a precedent was presumably also connected to some extent with the view held and expressed by this Tribunal in a number of trials of war criminals, namely, that the hostilities begun against Poland on 1st September, 1939, did not constitute a war according to international law, but a " criminal invasion " in violation of a non-aggression pact. Consequently, in the opinion of the Tribunal, the so-called " occupation " of the Polish territories taken by force of arms was not even an occupation in the true meaning of that word, but " an unlawful seizure of territory by force and compulsion." Therefore, such an act should be evaluated in accordance with the well-known maxim of Roman law that *quod ab initio turpe est, non potest tractu temporis convalescere.* The Tribunal held further that even if one were to accept the view that it nevertheless was an occupation, though only a *de facto* one, yet it was carried out in violation of all the postulates and rules of the Hague Regulations ; it was a caricature of military administration as understood by international law, carried out in flagrant violation of all the rights of the local population.(2)

It is apparent that the description " occupation government " applied in the preceding sections has been used in a wider sense. This government, declared by the Tribunal as criminal organisation, consisted of members of the Cabinet, *i.e.*, the Governor-General, his deputy, and all heads of departments in the central office of the Governor-General ; and of the district-governors and all other high ranking officials of district offices enumerated by the Tribunal.

If we take the first group, it can be said that from the point of view of State administration on governmental level, some definite similarity of organisation and structure existed between the Cabinet of the Government-General and that of a government of a sovereign State as a whole.(3) This

(1) To countries which have expressly enacted that some other organisations, named in advance, are to be regarded as criminal, belong, for instance, Czechoslovakia which included among such groups six other German, Hungarian or quisling organisations. The law laid down by other countries, like France, permit on the other hand to declare as criminal any organisations or undertakings of systematic terrorism. (See the *History of the United Nations War Crimes Commission, op. cit.*, Chapter XI, part C, pp. 324-331.)

(2) These views have been expressed by the Tribunal in the case against Artur Greiser, Vol. VII, pp. 110-112 ; in the Trial of Albert Forster, Gauleiter of Danzig, not reported upon in this series ; and the present trial of Joseph Buhler.

(3) It is regretted that because of lack of space, it was not possible to provide detailed information on the organisation of the German administration in the Government-General. Its general description has been presented in Section 2 (ii) of Part A above.

similarity and also that of the criminal purposes, permit a comparison between the stand taken by the Polish Tribunal and the findings of the Nuremberg Tribunal as regards the Reich Cabinet which, it had been alleged, was also a criminal organisation.

The prosecution at Nuremberg named the Reich Cabinet (Die Reichsregierung) as a criminal organisation, which consisted of the ordinary cabinet, further of members of the Council of Ministers for the Defence of the Reich, and members of the Secret Cabinet Council. The term " ordinary cabinet " as used in the Nuremberg Indictment meant the Reich Ministers, i.e. heads of departments of the Central Government ; Reich Ministers without portfolio ; State Ministers ; and all other officials entitled to take part in the meetings of this Cabinet. It was further alleged that these persons functioning in association as a group, possessed and exercised legislative, executive, administrative and political powers and functions of a very high order in the system of German Government. Accordingly, they were charged with responsibility for the policies adopted and put into effect by that Government, including those which comprehended and involved the commission of the crime of the common plan or conspiracy, crimes against peace, war crimes and crimes against humanity.(1)

The Nuremberg Tribunal was of the opinion that no declaration of criminality should have been made with respect to the Reich Cabinet, and this for two reasons. The first, which is of no relevance to the matter discussed here, was that it was not shown that after 1937 the Reich Cabinet ever really acted as a group for the purpose of conspiracy to make aggressive war. The Tribunal added, however, that " various laws authorising acts which were criminal under the Charter were circulated among the members of the Reich Cabinet and issued under its authority and signed by the members whose departments were concerned. This does not, however, prove that the Reich Cabinet, after 1937, ever really acted as an organisation."(2)

As to the second reason, the Tribunal stated :

> " It is clear that those members of the Reich Cabinet who have been guilty of crimes should be brought to trial ; and a number of them are now on trial before the Tribunal. It is estimated that there are 48 members of the group, that eight of these are dead and 17 are now on trial, leaving only 23 at the most, as to whom the declaration could have any importance. Any others who are guilty should also be brought to trial ; but nothing would be accomplished to expedite or facilitate their trials by declaring the Reich Cabinet to be a criminal organisation. Where an organisation with a large membership is used for such purposes, a declaration obviates the necessity of inquiring as to its criminal character in the later trial of members who are accused of participating through membership in its criminal purposes and thus saves much time and trouble. There is no such advantage in the case of a small group like the Reich Cabinet."(2)

From the above statement it seems that purely practical considerations guided the Tribunal in refusing to make a general declaration on the criminal

(1) See *Nuremberg Indictment*, His Majesty's Stationery Office, Cmd. 6696, pp. 40-41.

(2) See *Nuremberg Judgment*, His Majesty's Stationery Office, Cmd. 6964, p. 81.

character of the Reich Cabinet, and that on the other hand the Tribunal was fully aware of the responsibility which rested on members of this Cabinet, for crimes committed by enacting various laws that authorised acts that were criminal under the Charter. In fact, most of the 17 members of this group of persons who were on trial at Nuremberg, have been found guilty of war crimes, and/or crimes against humanity.

It has been shown in Part A of this report what was the responsibility of members of the Cabinet of the Government-General, what were the various laws enacted by it and authorising acts which were criminal under international and municipal law, and the extent of criminality committed in pursuance to these laws and administrative directives. The responsibility for them rested in fact not only on the Cabinet, but also on a large number of high administrative German officials who occupied the kind of positions indicated in the declaration of the Polish Tribunal. These officials were members of the German administrative apparatus which was built up for the realisation and putting into effect of general plans laid down by the Reich Government, and which in a very large measure flouted principles binding on all civilised nations. All these officials had great power, each headed an appropriate department or government office, and each participated in preparing and realising the Nazi programme in occupied Poland. Their number was comparatively large, comprising several hundred persons, and therefore it was thought by the Polish Tribunal that a declaration of criminality against this group of persons was expedient and of great importance.

CASE No. 86

TRIAL OF HANS PAUL HELMUTH LATZA AND TWO OTHERS

BY THE EIDSIVATING LAGMANNSRETT (COURT OF APPEAL)
AND THE SUPREME COURT OF NORWAY

18TH FEBRUARY, 1947—3RD DECEMBER, 1948

Liability for War Crimes, including Murder, Delivery of Judgment Contrary to Better Knowledge and Denial of a Fair Trial.

On the 8th February, 1945, a Standgericht was set up in the SIPO (Security Police) Headquarters in Oslo on the orders of the German Reichskommissar in Norway, Joseph Terboven. The accused Hans Paul Helmuth Latza acted as president of the Standgericht. The two other accused occupied the position of assessor judges. The immediate cause for the setting up of the Standgericht was the killing on the same day of the Quisling Chief of Police, General Martinsen.

During that same day the Standgericht sentenced to death four very prominent Norwegians, all of whom were arrested on that day, and another Norwegian belonging to the indigenous police, who had failed to denounce to the German authorities his two brothers-in-law who were involved in certain contemplated acts of sabotage. The sentences were carried out the following morning.

It was alleged by the Prosecution in the Norwegian trials that the sentences passed by this Standgericht were in fact camouflaged acts of reprisals and that the victims had been sentenced to death according to German provisions which were allegedly at variance with the laws and customs of war and in any case had based their decision on evidence which could possibly not justify the passing of a death sentence. After the liberation of Norway the accused were charged with having committed a war crime in that they through a denial of a fair trial and judging against their better knowledge had unlawfully caused the death of the five above-mentioned Norwegian citizens.

The case against them was in the first instance tried by the Eidsivating Lagmannsrett (a Court of Appeal). The accused Latza was found guilty and sentenced to imprisonment for a period of 15 years, whereas the two other accused were acquitted.

An appeal against this sentence was filed with the Supreme Court of Norway by the Prosecution in respect of all the accused as well as by the accused Latza on his own behalf. By the decision of the Supreme Court the sentence and trial of the Lagmannsrett was quashed and a re-trial by the Lagmannsrett, composed of new judges, ordered. After a renewed hearing of the case the Lagmannsrett acquitted all the accused. The

Prosecution once more appealed against the judgment of the Lagmannsrett on questions of law but by the final decision of the Supreme Court the findings of the Lagmannsrett were upheld and the appeal rejected.

In their judgments the Lagmannsrett and the Supreme Court dealt with the important question of the minimum demands required by international law where criminal proceedings are taken by an occupant against citizens of an occupied country.

The evidence before the trial courts and the legal questions discussed are outlined in this report.

A. OUTLINE OF THE PROCEEDINGS

1. THE COURTS

The courts before which this trial was held was the Eidsivating Lagmannsrett (one of the five Courts of Appeal) and the Supreme Court of Norway.[1]

2. THE INDICTMENT

The accused whose names appeared in the Indictment were the following : Hans Paul Helmuth Latza, Reinhold Regis and Christian Kehr. The Indictment filed against the accused reads in pertinent parts as follows :

> " (1) Hans Paul Helmuth Latza, born 6th June, 1908, German citizen ; (2) Reinhold Regis, born 6th January, 1903, German citizen ; (3) Christian Kehr, born 26th October, 1905, German citizen, are hereby charged before Eidsivating Lagmannsrett in accordance with Law No. 14 of 13th December, 1946, Article 1 (with which should be read Article 3) which provides punishment for an enemy citizen who has violated the laws and customs of war, provided the act, by reason of its character, came within the scope of a Norwegian provision of criminal law, and has been committed in Norway or directed against a Norwegian citizen or the Norwegian State, while Article 3 increases the punishment if :
>
> (*a*) the act has caused grave bodily injury, grave suffering, prolonged deprivation of freedom, or extensive damage to property ;
>
> (*b*) the act resulted in death, even though this outcome was not intended ;
>
> (*c*) chapters 21, 22, and 25 of the Civil Criminal Code were repeatedly violated ; or
>
> (*d*) particularly aggravating circumstances were present ;
>
> with which should be read Article 233 of the Civil Criminal Code, which provides punishment for he who unlawfully causes another person's death, or is an accomplice thereto, and which increases the punishment if the guilty person acted intentionally or committed the murder in order to facilitate or disguise or to escape punishment for another crime, in the case of recurrence, or if other particularly aggravating circumstances are prevailing ;
>
> with which should also be read Article 110 of the Civil Criminal Code

[1] For a general account of Norwegian substantive and procedural law applicable in War Crime Trials, see Volume III of this series, pp. 81-92.

which provides punishment for a judge, member of a jury or a judicial surveyor who in this capacity acts against his better judgment, which provision increases the punishment if, as a result of the offence, a death sentence has been executed.

" The following particulars form the basis of the Indictment :

" The accused No. (1) Hans Latza and the accused Nos. (2) and (3) Reinhold Regis and Christian Kehr acted on the 8th February, 1945, at Victoria Terrasse in Oslo as president and assessor judges respectively of a German Sondergericht (Special Tribunal) which sentenced the following persons to death : 1. Haakon Saethre, 2. Jon Vislie, 3. Carl Ferdinand Gjerdrum, 4. Kaare Sundby and 5. Aage Martinsen.

" The verdict and sentences were passed according to provisions of criminal law which were at variance with the laws and customs of war, or in violation thereof were based on evidence which obviously was not sufficient to lead to the passing of a death sentence.

" During the trial the accused acted, as judges, against their better knowledge in so far as the minimum demands required by international law for legal proceedings were not met, in that the guilt of the defendants was not adjudged in a fair way, and in that they had not been given that opportunity to defend themselves and submit counter-evidence which is prerequisite for a fair trial.

" As a result of the accused's acts, death sentences were passed and executed, whereby the accused caused the five persons' death."

3. PROGRESS OF THE TRIAL

The Indictment was served upon each of the accused on the 12th April, 1946. They were arraigned on the 18th February, 1947. Each of the accused entered a plea of " Not Guilty " in the presence of a Norwegian leading counsel and an assistant German counsel of their own choice. The first trial before the Eidsivating Lagmannsrett started on 18th February, 1947. A great number of witnesses were called by the Prosecution as well as by the Defence. Numerous documents were also admitted in evidence on behalf of the Prosecution as well as on behalf of the Defence. Judgment was delivered on the 12th March, 1947. The accused Hans Latza was found guilty and sentenced to imprisonment for a period of 15 years, whereas the two other accused were acquitted. An appeal against the verdict and sentence was filed with the Supreme Court by the Prosecution in respect of all the accused as well as by the accused Latza on his own behalf. By the Supreme Court's decision of 16th September, 1947, the trial and the Judgment of the Lagmannsrett was quashed and a re-trial ordered before the same Lagmannsrett composed of new judges. The re-trial of the case before the Eidsivating Lagmannsrett commenced on the 20th January, 1948, and the Judgment was delivered on the 29th January, 1948. This time all the accused were acquitted. Another appeal was filed with the Supreme Court by the Prosecution, but by the final decision of the Supreme Court, delivered on 3rd December, 1948, the judgment and findings of the Lagmannsrett were upheld and the Prosecution's appeal rejected.

A German interpreter assisted the Court throughout the trial.

4. THE POSITION OF THE ACCUSED

Hans Paul Helmuth Latza, born 6th June, 1908, had graduated in law. At the beginning of 1940 he was appointed judge in the S.S. und Polizeigericht in Praha and went to Norway in May, 1940. He acted as president of the S.S. und Polizeigericht IX and Polizeigericht Nord from that time until the liberation of Norway. He was a member of the N.S.D.A.P. (Nazi Party) and had belonged to the Waffen S.S. since 1933. He obtained the rank of Hauptsturmfuehrer.

Reinhold Regis, born 6th January, 1903, had graduated in Law and was later created a doctor of law. He was first employed in Government administrative service and served later as a Judge in the German Courts. In 1938 he was appointed Oberlandesgerichtsrat and continued in this position until he went to Norway on 15th February, 1942, where he was assigned to administrative duties. He had on a previous occasion served as a judge in the S.S. und Polizeigericht Nord. He was a member of the N.S.D.A.P. from 1933 but had not been a member of the S.S.

Christian Kehr, born 26th October, 1905, studied law for a short period but had not graduated. After the outbreak of war he served in the Ordnungspolizei in various parts of Germany until he was transferred to Norway in January, 1943. He served with the Staff of the Ordnungspolizei in Oslo from April, 1944. He held the rank of Hauptmann.

5. THE EVIDENCE BEFORE THE TRIAL COURTS

The S.S. und Polizeigericht IX, which was set up primarily to deal with members of the German Police and the S.S. in Norway, was by Decrees of 17th September, 1941, and 21st January, 1942, vested with powers to deal with trials of Norwegian citizens and was in this capacity named " S.S. und Polizeigericht Nord."

In June or July, 1944, Hitler decreed that all courts-martial in the occupied territories, except in Denmark, were to be abolished and the S.I.P.O. in every country was vested with discretionary powers to decide on the punishment in cases where offences of a political character had allegedly been committed. The Police could thus without trial pass a decision of execution on any Norwegian citizen whom they arrested, as they saw fit. It occurred, however, on several occasions that death sentences were pronounced on people who had been arrested immediately before the decisions were taken without proper investigations being carried out.

The accused Latza, who was president of the S.S. und Polizeigericht Nord, had gone to Germany in the summer of 1944 to find out whether the same exception which had been made in the case of Denmark, could be applied to Norway, but had to return having accomplished nothing.

On February 8th, 1945, the Quisling Chief of Police, General Martinsen, was shot in Oslo on the way to his office. The Chief of the S.I.P.O., Fehlis (committed suicide), was informed and arrived at the scene of the killing, but the perpetrators had escaped. It was evident that General Martinsen had been killed by members of the underground movement on special orders. Fehlis immediately asked for a conference with Reichskommissar Terboven (committed suicide), and later a meeting was arranged with members of his staff. At a second meeting on the same day Fehlis announced

that Terboven had ordered the setting up of a Standgericht as a countermeasure against the growing sabotage and terror activities of the underground movement. The Standgericht was to try several people who were regarded as the brains behind the movement (intellektual Urheber). Dr. Kolb, a member of the S.I.P.O. who had recently arrived from Germany, was sent to the accused Latza to ask him to preside over the Standgericht. According to the accused Latza's statement, he had, though not categorically refusing, argued with Dr. Kolb that as the S.S. und Polizeigericht Nord had been abolished, he was not the right man to preside over the court. At about noon the accused Latza received orders from Fehlis to go to his office as a conference had been arranged at Terboven's private residence in Skaugum, outside Oslo, for that afternoon. Fehlis, Dr. Kolb and the accused went to Skaugum by car. According to reports from Dr. Kolb and the driver, Fehlis on the way had explained the situation to the accused Latza and the accused had brought up the same arguments against his presiding over the court as he had made to Dr. Kolb in the morning.

At the conference at Skaugum, Terboven, had said that he had recently been to Germany to confer with the Fuehrer on the situation in Norway. Hitler had not agreed to Terboven's proposal to organise a counter-terror (Gegenterror) in Norway as he did not want martyrs. He had given orders for the setting up of Standgerichts to cope with the ever increasing activities of the home front. Terboven had, therefore, decided that the killing of General Martinsen was the opportune occasion for the setting up of such a Standgericht and asked the accused Latza to preside over the court. The accused Latza had again tried to reason with Terboven, arguing that his court had lost the authority to deal with Norwegians and also that he regarded the setting up of a Standgericht without the declaration of a state of emergency as unlawful. He had asked the conference to allow a trial by the S.S. und Polizeigericht Nord. His proposal was refused point blank by Terboven, who had said that Hitler's orders had been to set up a Standgericht without the declaration of a state of emergency. The accused stated : " Realising that Terboven's orders had come direct from Hitler, I no longer hesitated."

It may be assumed that it was decided at Skaugum that two trials would be held, one against " the brains of the home front " and another against some saboteurs who had been arrested some time ago. There was, however, no mention of the names of those to be tried.

It was further decided at that meeting that the Standgericht should sit the same evening at Victoria Terrasse and that the judges should be the accused Regis and Kehr, who were informed by telephone by the accused Latza to attend the Standgericht.

When the accused Latza arrived with Dr. Kolb at Victoria Terrasse direct from the meeting at Skaugum, he found there, among others, Fehmer, Kriminalrat Weiner (committed suicide), the accused Regis and Kehr and his secretary Silbermann. Fehlis who had not arrived was expected at any moment. All three accused stated that the trial did not start for another hour or so as they had been told that the prisoners had not yet arrived from Grini Concentration Camp. It was, however, established by the evidence that four of the persons to appear before the Standgericht, namely, Saethre, Vislie, Gjerdrum and Sundby had been arrested in the course of the same

afternoon and taken direct to Victoria Terrasse where they arrived shortly before the trial started, whereas the fifth person referred to in the Indictment, Aage Martinsen, had, together with some other alleged saboteurs who were also to be tried, been detained for some time in Grini Concentration Camp.

It was not possible to establish exactly what took place at Victoria Terrasse immediately preceding the trial. According to the accused Latza, he had talked to members of the S.I.P.O., particularly to Kriminalrat Weiner, who had undertaken to act as prosecutor against the so-called intellectual leaders of the home front. It was then, if not before, that the accused Latza was told that the intellectual leaders were to be tried. The accused Latza was given by Weiner some documents concerning the case and going through them, he came across the name of Henry Johannessen, aged 60, who was among those to be tried.

When Fehlis arrived, he gave a résumé of the meeting at Skaugum for the benefit of those who had not been present. The accused Latza then told Fehlis that he did not want to preside over a trial which had not been prepared beforehand by the police and mentioned two persons who, he knew, had been arrested that day. He also refused to try Henry Johannessen because of his age. Fehlis gave in and three names were crossed from the list.

All three accused maintained that they were unaware that Saethre, Vislie, Gjerdrum and Sundby had been arrested the same day. The accused Latza had been sure that they were among those prisoners expected from Grini and that they had already been interrogated by the police.

The trial against the intellectual leaders began between 21.00 and 21.30 hours with the accused Latza presiding and the accused Regis and Kehr as assessors, Weiner as prosecutor and Silbermann as secretary and an interpreter. Dr. Kolb was also present in case Weiner who had no legal education, should need his assistance.

As Weiner acted in a double capacity, both as prosecutor and witness, the accused Latza had reminded him of his duties and responsibilities as a witness before the opening of the proceedings.

Weiner prosecuted from notes. He did not propose to call witnesses as some, according to his explanation, members of the German police, had been sent elsewhere and others, Norwegian denouncers, could not be called for safety reasons. But Weiner had personally vouched for the evidence. All three accused stated that Weiner, whom they hardly knew, had presented his case clearly and exactly, without hesitation. They had all protested against the prosecutor taking the last word, but it was not possible to ascertain how the protest ended.

As customary in German legal procedure, the reasons for the verdict and sentence were set down in writing later. All those tried were told that the court had sentenced them to death but that the sentences had to be confirmed by Rediess (committed suicide) and that the question of reprieve rested with Terboven.

It was not possible to ascertain whether any of the accused had asked for a defence counsel. Of the four people sentenced to death in the first trial, only Dr. Saethre had asked for an adjournment, saying that he had treated many Germans in his hospital and could submit corresponding proof.

The accused Latza had answered that the court did not doubt that he had fulfilled his duty as a medical man.

The first to be tried was Dr. Saethre, a head-physician of Ullevaal Hospital outside Oslo. The hospital was known to be a veritable nest of the home front, according to the German prosecutor, and Dr. Saethre was regarded as the leader of anti-German propaganda and the secret news service. Jewish prisoners who had been sent for treatment to the hospital from prisons, had disappeared and Dr. Saethre was charged with having sabotaged the security measures which the German authorities had laid down for the safeguarding of the prisoners at the hospital. He was also charged with having made financial contributions to the home front.

Dr. Saethre, according to the accused, had admitted having made it difficult for the Germans to carry out their safety measures, and his financial contributions to the home front, but he had denied having taken part in anti-German propaganda although the prosecutor, Weiner, had quoted instances which he read from his notes, allegedly received from reliable witnesses.

Dr. Saethre was sentenced to death in accordance with Article 1, Nos. 2, 4 and 6 of the German occupational decree of 12th October, 1942, for having given financial help to the home front, for anti-German propaganda and for having helped prisoners to escape.

Advokat Gjerdrum, according to the accused, was charged with being an intellectual leader of the home front and with having organised a transport of refugees to Sweden with the aid of the Swedish Vice-Consul von Edelstam. He was also charged with having provided people with faked identity cards and of having hidden students who were wanted by the German police in connection with the German persecution of students and professors at Oslo University. The information had, according to the German prosecutor, been received from von Edelstam's former maid.

Advokat Gjerdrum, according to the accused, had denied all the charges and had only admitted that three months before he had been warned of danger and advised to escape.

Gjerdrum was sentenced to death in accordance with Article 1, Nos. 1 and 5 of the above-mentioned German decree for having worked against the Germans and having helped people to escape from the country.

Director Sundby, according to the accused, was charged with being the leader of a local underground movement and with having organised the delivery of arms to the home front with his own lorries. He was further charged with having listened to news from London. The German prosecutor's case against Sundby had, among other things, been based on a report received from a Swede who had formerly worked with Sundby. According to the accused, Sundby had only admitted to having listened to news from London and to having lent his lorries to the home front, but he had categorically denied any knowledge of their having been used for the transport of arms.

Sundby was sentenced to death in accordance with Article 1, Nos. 2 and 5 of the same German decree for having taken part in illegal activities, in particular for having assisted in the transport of arms for illegal purposes and for having listened to news from London.

Advokat Vislie, according to the accused, had been charged with having been the leader of anti-German propaganda in a suburb of Oslo and with having given financial assistance to patriotic organisations. The accused claimed that Vislie had admitted the financial help to patriotic organisations, but had categorically denied all anti-German propaganda, information on which the German prosecutor had allegedly received from a Norwegian policeman.

Vislie was sentenced to death in accordance with Article 1, Nos. 2 and 4 of the above-mentioned German decree for illegal activities, anti-German propaganda and financial aid to the underground movement.

After an adjournment the Standgericht began the second trial against the seven saboteurs who were all dealt with together. The evidence showed that six of them had without doubt been active as saboteurs, whereas the seventh, Aage Martinsen, referred to in the Indictment, had not been a party or accomplice to any such act. Aage Martinsen was only shown to have been guilty of not having denounced his two brothers-in-law, whom he knew had taken part in such sabotage activities. All seven prisoners, including Martinsen, were sentenced to death according to Article 3 of the above-mentioned German decree.

After the completion of this second trial, the three accused had discussed the question of recommending Dr. Saethre and Aage Martinsen for reprieve. The accused Latza had at once got in touch with Terboven by telephone, but had been met with refusal.

It appeared from a statement made by Fehlis's driver that the latter had been waiting in the ante-room of the Standgericht while the proceedings were in progress. The driver stated that when the seven saboteurs had been taken into the court room, he had heard Fehlis and the German prosecutor Weiner discuss whether Aage Martinsen should be tried too. Thereupon Dr. Braune, who was also present said : " If we keep one back the press has to be held back and the already printed issues have to be scrapped."

All the eleven men sentenced to death were executed by shooting in the early hours of 9th February, 1945.

The morning issue of " Aftenposten " of February 9th, 1945, reported the death sentences passed on eleven people by the Standgericht, tried the night before, and that all eleven had been shot.

6. JUDGMENT OF THE EIDSIVATING LAGMANNSRETT DELIVERED ON 12TH MARCH, 1947

The Lagmannsrett held that the setting up of the Standgericht did not constitute a breach of international law. Its setting up was necessitated by the urgent character of recent activities by members of the home front aimed at endangering the security of the occupation power. Its setting up on that particular date was caused by the killing of General Martinsen. The Germans had a special regulation for procedures of such courts which they called " Verordnung ueber das militaerische Strafverfahren im Kriege und bei besonderem Einsatz," dated 17th August, 1938. Article 1 of the Verordnung contained four points which all three accused had maintained

had been met with during the two trials at issue. These four points provided :

(i) Three judges had to take part in the trial.

(ii) The accused had to be given the last word.

(iii) The sentences had to be passed by a majority vote, put down in writing and to give the reasons.

(iv) The sentences had to be confirmed by a " Befehlshaber."

The Lagmannsrett drew attention to the fact that the archives of the Standgericht had been destroyed. Thus it had been impossible to ascertain how far the sentences were supported by the premises, but it might be said that according to German law, the premises could be set down *after* the sentences had been passed, and the Lagmannsrett could not but accept the statements of the accused that the regulations concerning the reasons for the sentences had been fulfilled.

What had made these particular trials unlawful, in the opinion of the Lagmannsrett, was that several rules intended to safeguard the accused had been disregarded. The trials had been intended to have the effect of reprisals and it must be assumed that the three accused had opened the trial with the intention of meting out particularly severe punishment for preventative reasons. The Lagmannsrett pointed out that in violation of these general regulations :

(i) the accused were not given a counsel for defence,

(ii) they had been arrested on the day of the trial and had thus not been able to prepare their defence,

(iii) the Standgericht had accepted as proof evidence produced indirectly by the prosecutor who had maintained that the witnesses could not be called for safety reasons,

(iv) the judges had not used their right and duty to adjourn the trial for further evidence,

(v) at least Dr. Saethre and Advokat Vislie had been sentenced to death on insufficient evidence for acts which, from the point of view of international law, were hardly punishable by death sentence.

As to Dr. Saethre the Lagmannsrett held that the only evidence on which he could have been properly convicted and sentenced by the Standgericht was his admission of having refused to hand over to the Germans Jewish patients who in reality had taken refuge in the hospital. The Lagmannsrett found that it had not been proved that Dr. Saethre had given financial aid to illegal organisations.

In the case of Advokat Vislie the Lagmannsrett pointed out that the Standgericht had based its sentence on the grounds that Vislie had given financial aid to teachers and clergymen who had been unlawfully dismissed by the Quisling government. The Lagmannsrett held that according to international law those acts could not be punished, and it was obvious that the German Jew-baiting and the persecution of teachers and clergymen in Norway were at variance with international law and therefore Dr. Saethre's help to them was lawful. The fight of the Church and the Schools was a reaction against unlawful nazification. Financial support to teachers and

the clergy were in those circumstances activities which could not be punished according to international law.

The Lagmannsrett held that the position as far as Advokat Gjerdrum and Sundby were concerned was somewhat different as it might be assumed that there had been sufficient evidence before the Standgericht of their having committed acts which could be punished according to international law.

It was pointed out by the Lagmannsrett that trials as inadequate as those dealt with by the Standgericht, which had sentenced innocent people to death, were no doubt contrary to international law. The members of that court had acted criminally " at variance with these basic rules of international law, which had become common usage between civilised States, contrary to the laws of humanity and against the dictates of public conscience " (cf. No. IV of the Hague Conventions).

As to the sentence passed by the Standgericht on Aage Martinsen, the Lagmannsrett said that the question arose whether Article 3 of the above-mentioned German decree, according to which he was sentenced, was contrary to international law, as it provided for the death penalty for any person who " gives shelter to or in any other way aids agents or persons who work for the benefit of an enemy state."

The Lagmannsrett pointed out that a state of war existed between Norway and Germany at that time and that thus Article 3 of the said decree, when applied to a Norwegian citizen, who did not disclose to the German authorities information on the activities of the underground movement, was tantamount to punishing Norwegian citizens for not committing treason to their own country. Experts on international law seemed, however, in the opinion of the Lagmannsrett, to regard the legality of such a provision as disputable. Reference was made to Alberic Rolin : " Le Droit Moderne de la Guerre," Volume I, p. 461, where the author distinguishes between ordinary military operations and acts undertaken by " combattants irreguliers," a term well applicable to the Norwegian saboteurs even though the acts of sabotage were ordered by the Norwegian High Command.

The Lagmannsrett considered the quoted German provision to be at variance with international law and found, that from an objective point of view, the sentence passed on Aage Martinsen by the Standgericht, must be regarded as a war crime. It was pointed out, however, that it was, according to Norwegian Constitutional law, a prerequisite for the punishment of a war crime that the act in question was at the same time also covered by a special provision of Norwegian municipal criminal law. In the Indictment it had been maintained that the accused's crimes were covered by Articles 223 and 110(1) of the Civil Criminal Code.

The Lagmannsrett concluded that it was not established by the evidence that any of the accused had acted against their better judgment (Article 110) and went on to discuss whether Article 233 could be applied. It was pointed out in this connection that the question as to whether or not the accused had acted intentionally with the full understanding that by their conduct they had caused another person's death, was different in the case of each individual accused and different in the case of Aage Martinsen as dis-

(1) The contents of these two provisions have previously been quoted. See pp. 50—1.

tinguished from the case against the other persons referred to in the Indictment.

As to the accused Latza, the Lagmannsrett came to the conclusion that he had acted intentionally as far as the sentences against Dr. Saethre and Advokat Vislie were concerned, whereas the position was different in respect to the accused Regis and Kehr.

The Lagmannsrett stressed the fact that the accused Latza had, since 1941, served as a judge with the S.S. und Polizeigericht Nord and had in that capacity taken part in the trial and sentence of a series of political crimes on previous occasions, which had mainly resulted in the death sentence. He was fully aware of the minimum demands necessary for the passing of a death sentence, as he had, during the whole period, been president of that court. As president of the Standgericht in question, he was the person to bear the main responsibility for the trials being conducted in a legal manner. In addition, it was pointed out, the accused Latza had in the morning been told that he would have to preside over the Standgericht, and it had to be taken for granted that he had been informed by Fehlis and Dr. Kolb that persons not directly connected with sabotage acts were to be tried. The Lagmannsrett also stressed the fact that the accused Latza had taken part in the discussions at Skaugum, where he must have learned that the whole trial was nothing but a camouflaged act of reprisal with only one possible outcome to those to be tried—the death sentence. Furthermore, during the conference with the German prosecutor Weiner at Victoria Terrasse, he must have clearly understood that the evidence which Weiner proposed to submit to the Standgericht was insufficient. In the opinion of the Lagmannsrett, the accused Latza must have been fully aware that the intention of the trial was to take reprisals and to clothe them in a cloak of legality. He had thus, unlawfully, wilfully and intentionally caused Dr. Saethre's and Advokat Vislie's death.

As to the accused Regis and Kehr the Lagmannsrett found that the position was somewhat different. Both of these accused had been summoned to act as judges at short notice and knew nothing about the background for the proceedings before they arrived at Victoria Terrasse. The information they had received from Fehlis immediately before the opening of the trial concerned the state of affairs after General Martinsen's killing, and they did not realise that there was also to be a trial of intellectual leaders. Neither did they know what evidence the German prosecutor Weiner was proposing to use, and it could not be held against them that they believed in the evidence submitted by him during the trials. The Lagmannsrett, therefore, did not find that the accused Regis and Kehr had been fully aware that they had been accomplices to the death of Dr. Saethre and Advokat Vislie.

As to the case against Aage Martinsen, the Lagmannsrett pointed out that no one of the accused as members of the Standgericht had gone into the question whether there was any evidence which could support the charge brought against him. From the evidence before the Standgericht it was quite clear that Aage Martinsen himself had not taken part in sabotage. His offence consisted only of having failed to denounce his compatriots. He had, therefore, in the opinion of the Lagmannsrett, been sentenced to death by the Standgericht at variance with international law. The Lagmannsrett found it established, however, that the accused had not been

aware that Article 3 of the said Verordnung was in itself at variance with international law. It was pointed out, as stated above, that experts on international law had declared that it was disputable to say that a person's negative attitude, *i.e.*, not volunteering information to the occupying power on acts of sabotage committed by non-uniformed people, was culpable. Article 3 of the said decree was contained in a Verordnung of 12th October, 1942, from the German Reichskommissar in Norway. This Verordnung was in turn based on the Fuehrer Order of 24th April, 1940. The Lagmannsrett held that from the German point of view the said provision was to be regarded as valid law. Reference was made to Professor Castberg's "*Folkerett*" (*i.e.*, International Law), p. 41, where he states that "it is a general presumption that national law is consistent with international law. Even if formal national law"—in this case the German Verordnung—"expressly lays down regulations at variance with principles of international law, the national law has to be obeyed by all authorities and citizens of that state."

The Lagmannsrett came to the conclusion that the accused had believed that Article 3 of the said Verordnung was consistent with international law and had thus been under a pardonable misconception.

The Lagmannsrett then proceeded to discuss whether Article 239 (having inadvertently caused another person's death) could be applied. It was held that as the illegality of Article 3 of the said Verordnung was disputable according to international law, it could hardly be said that the accused Regis and Kehr had fulfilled the mental qualifications laid down by Article 239 of the Civil Criminal Code when applying the provision of the Verordnung, particularly in the confused situation which prevailed on 8th February, 1945.

The Lagmannsrett found it doubtful whether the ignorance of all three accused as to the legality of Article 3 of the Verordnung in relation to international law should be regarded as covered by Article 42(1) or Article 57(2) of the Civil Criminal Code, but pointed out that even if Article 57 had to be applied their ignorance must be considered excusable.

7. FINDINGS AND SENTENCES BY THE LAGMANNSRETT

The accused Latza was found guilty and sentenced to imprisonment for a period of 15 years. The accused Regis and Kehr were acquitted.

8. THE APPEAL TO THE SUPREME COURT

(i) *The Appeal by the Prosecution*

The Prosecution filed an appeal with the Supreme Court against the findings and the sentence of the Lagmannsrett in respect of all three accused. In their appeal the Prosecution maintained *primarily* :

(1) that the reasons given by the Lagmannsrett were insufficient insofar as they did not expressly state whether the Standgericht trial was

(1) Article 42 of the Civil Criminal Code (regarding misconception of facts) reads : "If a person, when committing an unlawful act, was ignorant of factual circumstances determining or aggravating the punishability of the act, then these circumstances shall not be attributed to him."

(2) Article 57 of the Civil Criminal Code (regarding misconception of law) reads : "If a person, when committing an unlawful act, was ignorant of its illegal character, the punishment may—if the Court does not acquit him for that reason—be reduced below the minimum fixed for that particular offence, or commuted into a milder form of punishment."

in itself intended to be a lawful trial despite its inadequacy, or whether it was only intended to serve as camouflage for reprisals exceeding the limits of criminal law ;

(2) that the Lagmannsrett had wrongly interpreted international law insofar as it appeared to have based its judgment on the view that an occupying power was permitted to employ the death sentence for *any* illegal act committed by the citizens of the occupied territory ;

(3) that the reasons given by the Lagmannsrett were insufficient and inconsistent insofar as they maintained on the one hand that the accused Latza had been fully aware of the illegality of the trial whilst the Lagmannsrett on the other hand, did not find it proved that he had acted against his better judgment. In stating this, the Lagmannsrett had also wrongly interpreted Articles 110 and 233 of the Civil Criminal Code ;

(4) that the Lagmannsrett had wrongly interpreted and applied the term " against their better judgment " as understood in criminal law ;

(5) that the Lagmannsrett had erroneously applied the general presumption of the conformity of national law with international law, as stated by Professor Castberg's " International Law." It should be obvious that that presumption could only be applicable to citizens of the state that had issued the regulations in question ;

(6) that the Lagmannsrett had wrongly assumed that the accused's ignorance as to the legality of Article 3 of the Verordnung of 12th October, 1942, in relation to international law, must be regarded as a misconception of fact and not as a misconception of law ;

(7) that the Lagmannsrett was wrong in finding it excusable on the part of a German judge, who was supposed to be aware of the authority of international law, to apply provisions of national (German) law, which were at variance with international law, on citizens of an occupied territory ;

(8) that it was a mistake by the Lagmannsrett not to have considered the importance and effect of the German Decree of 26th April, 1942, submitted in evidence to the Lagmannsrett. By that decree the Reichstag had authorised Hitler to force, by whatever means and regardless of the laws already in force, every German to do his duty. That decree was also applicable to judges, and the activities of the Nazi courts and their attitude towards international law could not be understood or explained unless against the background of that decree ;

(9) that the reasons given by the Lagmannsrett were insufficient and inconsistent insofar as it had found that the accused Regis and Kehr had not been informed *beforehand* of the trial of the so-called intellectual leaders who had been arrested that day ;

(10) that it was untenable to state, as had the Lagmannsrett, that the accused Regis and Kehr, as distinct from the accused Latza, had not known *before* the trial that the prosecution's evidence against Dr. Saethre and Advokat Vislie was insufficient. It was, in the Prosecution's opinion, immaterial for the question of the accused's guilt, whether or not they had such knowledge, *before* the trial. It would be sufficient

for their conviction if they acquired such knowledge before they delivered their judgment ;

Subsidiarily the Prosecution maintained that in any case the punishment inflicted on the accused Latza was too lenient and proposed that the death sentence be applied.

The Prosecution's appeal concluded with primarily maintaining that the judgment and the findings of the Lagmannsrett should be quashed in respect of all three accused and a re-trial be ordered. In case the judgment and the findings of the Lagmannsrett should be upheld by the Supreme Court, the Prosecution subsidiarily asked that the death sentence should be imposed on the accused Latza.

(ii) *The Appeal by the Accused Latza*

The accused Latza filed an appeal on his own behalf with the Supreme Court against the sentence of the Lagmannsrett. His appeal was based on the following grounds :

(1) that as the Lagmannsrett had found that the Standgericht in the prevailing circumstances must be regarded as legal and in accordance with international law, there could only be the question whether Article 110 of the Norwegian Civil Criminal Code could be applied, and if so that would exclude the application of Article 233 of the said Criminal Code ;

(2) that even if Article 233 was found to be applicable concurrently with Article 110, his acts as a judge had to be examined in the light of German national law, which in this case had to be given preference to international law. In any case his ignorance of the true legal position should be regarded as excusable ;

(3) that there were no provisions of the laws and customs of war which fixed the minimum demands for legal procedure, neither were there any defined provisions of international law as to which acts could be declared punishable by an occupation power ;

(4) that even if Article 233 of the Civil Criminal Code were applicable in the case, the reasons given by the Lagmannsrett as to his personal guilt were insufficient and conflicting ;

(5) that in any case the punishment decided upon was too severe in view of the mitigating circumstances referred to by the Lagmannsrett.

9. JUDGMENT OF THE SUPREME COURT, DELIVERED ON 16TH SEPTEMBER, 1947

Judge Schei, the first judge of the Supreme Court to give his comments on the appeal, first dealt with the more general objections raised by the Prosecution and the accused Latza against the judgment delivered by the Lagmannsrett.

Judge Schei pointed out that the accused Latza had maintained under point three of his appeal that the acts for which he had been convicted, did not constitute a war crime which could be regarded as covered by Article 1 of the Norwegian Law No. 14 of 13th December, 1946. The accused Latza had argued that there existed no such provisions of the laws and customs of war which stipulated the minimum demands as regards court procedure ;

neither did there exist any provisions of international law as to which acts could be declared punishable by an occupation power. In any case, such provisions would, in Latza's opinion, have to recede in favour of national (German) law. The accused maintained that German procedural and substantive law was binding for the members of the Standgericht and he could thus not be convicted or punished unless he had violated German national law at the same time.

Judge Schei found that these points of the accused's appeal were obviously untenable. The fact that a war crime had been committed by an enemy citizen in his capacity as judge, obviously did not mean that such a crime was beyond the scope of the Norwegian law on the punishment of foreign war criminals. Even though it was often difficult to decide what was lawful according to international law and what was not, there was, in Judge Schei's opinion, no doubt that international law laid down certain minimum demands which were to be regarded as binding for the administration of justice of an occupying power. These minimum demands comprised among other things that an accused person could not be sentenced without a fair trial and without being given the opportunity to defend himself and present counter evidence. If a German court based a death sentence on manifestly insufficient evidence, as in the case at issue, where the accused Latza had been aware of the inadequacy of the evidence, it was, in Judge Schei's opinion, clearly at variance with basic principles of justice as expressed in the Preamble to the Hague Convention No. IV of 1907. Once international law acknowledged certain basic regulations as inviolable, these regulations must be adhered to irrespective of whether or not they were disregarded by national law.

Judge Schei then turned to point 1 of the Prosecution's appeal, where it was maintained that the reasons for the verdict given by the Lagmannsrett were insufficient insofar as it had failed to express clearly whether the Standgericht trials had in themselves been intended to be lawful trials despite its inadequacy or whether they had only been intended to serve as camouflage for reprisals and thus exceeding the limits of criminal law. He did not find it necessary to go into that question in detail. The decisive point was, in Judge Schei's opinion, whether the trials before the Standgericht had fulfilled those minimum demands which had to be regarded as indispensable for a proper trial, primarily whether the Standgericht as an independent and impartial tribunal had reached its decisions after a thorough investigation of the guilt of the accused, or whether the outcome had been determined beforehand by directives given to the court. Judge Schei agreed with the Prosecution that the Lagmannsrett had not sufficiently clearly expressed what conclusion they had reached on that important point.

Judge Schei pointed out that *on the one hand* the Lagmannsrett had stated :

(*a*) that the accused Latza during the discussions at Skaugum must undoubtedly have been aware of the fact that the whole legal machinery was in reality an arrangement for effecting reprisals on the assumption that those brought before the Standgericht should be sentenced to death ;

(*b*) that the accused Latza had been fully aware that the persons, who were to appear before the Standgericht, were the so-called intellectual leaders, who had been arrested immediately prior to the opening of the trial ;

(*c*) that the accused Latza had been fully aware that the evidence which the German prosecutor before the Standgericht, Weiner, was going to submit, could not possibly be regarded as sufficient ;

(*d*) that the accused Regis and Kehr, who had not taken part in the meeting at Skaugum, had been informed by Fehlis before the opening of the proceedings, of the measures decided upon by Terboven in connection with the liquidation of General Martinsen ; and

(*e*) that the Standgericht had been set up as a counter measure against the constantly increasing acts of sabotage and liquidations carried out by the Norwegian home front.

These statements by the Lagmannsrett had left Judge Schei with the impression that the Lagmannsrett might have been of the opinion that the Standgericht in reality had had no choice in the outcome of the trials and consequently that it would have been of minor importance to what extent the question of the guilt of those brought before the Standgericht could be sustained. That impression had been strengthened by what the Lagmannsrett had said in connection with the procedure of the Standgericht. Thus the Lagmannsrett had held that the Standgericht had disregarded the basic rights for the safeguarding of the accused when accepting as evidence indirect information presented by the prosecutor whose assertion that the witnesses concerned could not appear in person, was obviously untenable, and that the Standgericht had sentenced at least Dr. Saethre and Advokat Vislie to death on obviously insufficient evidence and for acts which could not be punished according to international law.

On the other hand, Judge Schei pointed out, the reasons given by the Lagmannsrett contained statements, which, in his opinion, were contradictory to those mentioned above. Thus the Lagmannsrett had described as less pertinent the account given in the Indictment that the setting up of the Standgericht had been a direct result of the various acts of sabotage which had culminated in the liquidation of General Martinsen. The Lagmannsrett had further stated that the aim of the Standgericht had been to effect reprisals and that it had felt satisfied that the judges of the Standgericht, when beginning the proceedings, were determined to impose severe penalties intended to have a general preventative effect. By making these statements, the Lagmannsrett had, in Judge Schei's opinion, intended to make it clear that even though the acts of sabotage and the liquidation of General Martinsen had constituted the immediate cause for the setting up of the Standgericht, it was not justifiable to draw further conclusions to the effect that the trial had not been intended to be a proper trial. The argument that the judges of the Standgericht had made up their minds beforehand to impose heavy penalties intended to have a preventative effect, could, in Judge Schei's opinion, only be understood to mean that the Lagmannsrett had assumed that the meting out of the punishment had been within the power of the court. The acquittal by the Lagmannsrett of the accused of having acted against their better knowledge (Article 110) seemed likewise, in Judge Schei's opinion, to indicate that the Lagmannsrett had assumed that the trials before the Standgericht had been real ones. This view, however, could, Judge Schei pointed out, not be reconciled with what could be extracted from the other statements by the Lagmannsrett quoted above. That impression of obscurity, which the reasons given by the Lagmannsrett had

left on such an important issue, would, in Judge Schei's opinion, be sufficient to lead to the quashing of the entire judgment and findings of the Lagmannsrett.

Judge Schei then turned to points of the appeal which were of a more specific nature and which were primarily concerned with the application of law.

He mentioned that the accused Latza in point 1 of his appeal had maintained that the Lagmannsrett had misinterpreted the law when finding that both Article 110 and Article 233 of the Civil Criminal Code could be applied cumulatively. In the accused Latza's opinion, only Article 110 was applicable, and the application of that provision would, in his view, exclude the application of Article 233. Judge Schei could not accept this view. He pointed out that Article 110 of the Civil Criminal Code contained no provision as to murder. It stipulated the punishment for a judge, a member of the jury or a juridical surveyor having acted against their better judgment without making it a condition for defendant's guilt that the act should result in harmful consequences. When paragraph three of that provision allows for an increase of punishment, *e.g.*, if a death sentence has been executed as a consequence of the unlawful act, it was only to be regarded as a directive as to the measurement of punishment as distinct from the question of guilt. That particular provision was, Judge Schei pointed out, applicable even though the execution of the death sentence was not contemplated or intended, as distinct from Article 233 where it is a condition that the defendant had such knowledge or intention. Thus, as the crime and the factual and mental prerequisites described in Article 233 were incongruous with the crime described in and the qualifications required by Article 110, the Lagmannsrett had, in Judge Schei's opinion, rightly assumed that it was possible to apply both provisions cumulatively.

Judge Schei then drew attention to point 3 in the Prosecution's appeal where it was claimed that the acquittal of the accused in respect of Article 110 was the result of an erroneous interpretation of law and that the reasons given by the Lagmannsrett on that point were insufficient and inconsistent. Judge Schei agreed with the Prosecution on that point and drew the Court's attention to the fact that the Lagmannsrett on the one hand had found that it had not been possible to prove that any of the accused acted against their better judgment in their capacity as judges. On the other hand, when considering the accused's responsibility for the death of Dr. Saethre and Advokat Vislie, the Lagmannsrett had hesitated to sustain that the accused Regis and Kehr had been fully aware of the fact that they had, contrary to law, contributed to the murder of these two persons. According to Article 110, however, Judge Schei pointed out, it was not material whether the accused understood that they by their acts would cause the death of the person concerned.

As to the accused Latza, Judge Schei pointed out that the Lagmannsrett had found that the accused had acted intentionally in the case of Dr. Saethre and Advokat Vislie. The Lagmannsrett had stated that the accused Latza was fully aware that the evidence submitted could not possibly be regarded as sufficient and that he had known that the whole legal machinery was in reality a measure for effecting reprisals with the presupposition that those brought before the Standericht should not escape being sentenced to death.

The Lagmannsrett had failed, Judge Schei pointed out, to indicate which of the prerequisites for the conviction of the accused according to Article 110 had been absent in those circumstances.

Considering the inadequacy and inconsistence of the Lagmannsrett's attitude on that point, Judge Schei agreed with the Prosecution that the acquittal of all three accused for violation of Article 110 must be quashed.

Judge Schei then went on to say that the same wrong interpretation of law, which the Lagmannsrett seemed to have applied as regards the mental requirements laid down by Article 110, also applied to the acquittal of the accused Regis and Kehr as far as the charge for violating Article 233 was concerned. According to the latter provision it was immaterial, contrary to what the Lagmannsrett seemed to have presupposed, whether the accused had been fully cognisant that they *unlawfully* contributed to the murder. They might have acted intentionally even though they had not been aware of their acts having been unlawful, cf. Article 57 of the Civil Criminal Code (concerning the effect of a misconception of law).

As to point 6 of the Prosecution's appeal, Judge Schei agreed that the accused's ignorance as to the legality of Article 3 of the Verordnung of 12th October, 1942, in relation to international law, must be regarded as a misconception of law, cf. Article 57 of the Civil Criminal Code. He did not find it necessary to elaborate on that point as he considered that the Judgment of the Lagmannsrett, in view of what he had stated above, would have to be quashed in its entirety.

In conclusion Judge Schei said that he did not find it necessary to deal with the remaining points of the appeals and voted for the quashing of the judgment and the findings of the Lagmannsrett on the basis of the arguments already presented by him.

The remaining judges of the Supreme Court, Holmboe, Berger, Jensen, Eckhoff, Evensen, Fougner, Johannessen and Stang supported the vote. Judges Holmboe, Berger and Jensen, however, in supporting the vote expressed a dissenting view on some minor points touched by Judge Schei.

10. DECISION OF THE SUPREME COURT

By decision of the Supreme Court pronounced on the 16th September, 1947, the trial, verdict and sentence of the Lagmannsrett were quashed.

11. RE-TRIAL BY THE EIDSIVATING LAGMANNSRETT

A re-trial by the Lagmannsrett composed of different judges was instituted as a consequence of the decision of the Supreme Court to quash the proceedings and sentence of the previous trial.

12. ADDITIONAL EVIDENCE DURING THE RE-TRIAL

During the re-trial the same witnesses were heard and in addition to the existing documentary evidence, additional evidence was submitted. As the factual evidence has been fully reported above under heading 5, it is only necessary here to deal with new facts and aspects which emerged during the re-trial.

The Prosecution did not succeed in proving that the three accused, contrary to what the accused had maintained themselves, had been aware that Dr. Saethre, Advokat Vislie, Advokat Gjerdrum and Sundby had been arrested on the very day of the trial before the Standgericht.

Neither did the Prosecution succeed in proving that the accused Latza, as maintained by the Prosecution, had had a talk with the German Prosecutor, Weiner, before the trial, on the evidence which the Prosecutor proposed to submit or that the accused Latza had gone into the evidence thoroughly before the trial started.

13. SECOND JUDGMENT OF THE LAGMANNSRETT, DELIVERED ON 20TH JANUARY, 1948

After reviewing the facts and evidence the Lagmannsrett turned to the legal issues involved.

The Lagmannsrett held that although there were no express provisions of international law in force as regards court procedure to be followed by an occupation power, there were certain minimum demands which were indispensable, namely :

(*a*) that the tribunal or court in question shall be an impartial one and not bound by directives or orders from above.

In this connection the Lagmannsrett found that the Prosecution had not been able to prove that the accused had received any such directives or orders intended to have those accused before the Standgericht found guilty regardless of the evidence or to have death sentences imposed regardless of the degree of guilt ;

(*b*) that those accused before the tribunal or court in question shall be manifestly made acquainted with the concrete points of the charges brought against them. It could, however, not be regarded as essential that a written charge sheet be served upon the accused before the trial.

As to the case in hand, the Lagmannsrett found that that point had been complied with in so far as each individual accused brought before the Standgericht had been made acquainted by the Standgericht of the charges brought against him ;

(*c*) that the accused before the tribunal or court in question must be given opportunity to explain themselves and state their case freely and to counter each and every point of the charge.

The Lagmannsrett found that it was shown by the evidence that the accused before the Standgericht had been given such opportunity ;

(*d*) that the evidence submitted to the tribunal or court in question must be manifestly adequate to sustain the verdict and sentence.

The Lagmannsrett held that the Prosecution had not succeeded in proving that the accused before the Standgericht were not substantially guilty of the acts with which they had been charged, which acts could, according to German criminal provisions lead to the passing of the death sentence. It was pointed out that the evidence submitted to the Lagmannsrett indicated that Dr. Saethre, Advokat Vislie, Advokat Gjerdrum and Sundby had in fact been active in the underground movement. Thus, it appeared that Advokat Gjerdrum had helped prisoners to escape ; Sundby had been

district leader of the underground military organisation ; Dr. Saethre had given financial aid to the underground movement and had sabotaged safety measures imposed by the Germans in order to prevent the escape of prisoners from the hospital, and Advokat Vislie had given economic support to the underground movement and had been active as a leader of his district ;

(*e*) that the accused before the tribunal or court in question shall be given opportunity to offer and submit their counter-evidence.

As to the case in hand, the Lagmannsrett found that it had not been proved by the Prosecution that the accused before the Standgericht, apart from Dr. Saethre, had asked for an adjournment in order to submit counter-evidence. It was admitted by the accused that Dr. Saethre had offered to furnish evidence to the effect that he had conscientiously treated German patients in his hospital. An adjournment had, however, been found unnecessary as the Standgericht did not doubt that Dr. Saethre had fulfilled his duty as a medical man both to Norwegian and German patients. In these circumstances a refusal to adjourn the proceedings because of this particular point could not be considered to be contrary to the principles of procedural law.

As to the question whether or not an accused before such a tribunal or court was, according to international law, entitled to have the assistance of a defence counsel, the Lagmannsrett only observed that it had not been proved by the Prosecution that any of the accused before the Standgericht had demanded the assistance of a defence counsel.

As to the kind of evidence which might be admitted and accepted according to international law by such a tribunal or court the Lagmannsrett ruled that it could not be considered an indispensable principle of international law that the evidence submitted must necessarily be direct in the sense that witnesses had to appear in person before the tribunal or their names to be revealed. In that connection the Lagmannsrett made reference to the regulations issued by the Allied Occupation Authorities in Germany, applicable to ordinary military tribunals, according to which both oral evidence and affidavits may be used in evidence. In exceptional cases submission of evidence could even be denied, cf. Military Gazette, Germany, p. 15.

The Lagmannsrett pointed out that in the case in hand the Prosecutor before the Standgericht, Weiner, had acted in a double capacity—both as prosecutor and as witness. He had, however, been cautioned by the accused Latza before the opening of the proceedings as to his responsibilities and duties as a witness. It had further been proved that Weiner had quoted from witness reports which had ostensibly been submitted partly by the German police and partly by Norwegian denouncers, who, because of the confused situation and for security reasons, could not be allowed to appear in person.

The Lagmannsrett then turned to the point raised by the Prosecution that the punishment meted out by the Standgericht was out of proportion compared with the crimes for which the accused before the court had been convicted. It was pointed out by the Lagmannsrett that according to the provisions of the German Verordnung applied by the Standgericht, death sentences could be imposed for offences of the kind with which the accused

before the Standgericht had been charged, and the Prosecution had not contended during the present trial that that provision was in itself at variance with international law. The Prosecution had, however, maintained that in no case could the acts for which the accused before the Standgericht had been convicted lead to the passing of the death sentence. It was pointed out that the accused Latza had admitted that the punishment inflicted by the Standgericht, would probably have been more lenient in less turbulent times but in the prevailing circumstances, the punishment had to be severe if the setting up of the Standgericht were to have any meaning at all.

The Langmannsrett maintained that the meting out of punishment was always a matter of discretion where the generally preventative effect had to be taken into consideration. If certain offences showed a tendency of growing into dangerous proportions, tribunals were forced to mete out more harsh punishments than they would normally do. Considering what the situation must have looked like to the accused Latza, Regis and Kehr at that time, the Lagmannsrett could not find that the passing of the death sentences for those crimes allegedly committed and proved before the Standgericht could be regarded as a miscarriage of justice.

The Lagmannsrett then went on to discuss the point raised by the defence that, even if the procedure before the Standgericht had to be considered as being at variance with the requirements of international law, the accused must be acquitted because the procedural and substantive law applied by the Standgericht was in compliance with German national law, and in their submission, national law had priority over international law.

The Lagmannsrett ruled that even on the assumption that in normal circumstances international law had to recede in favour of national law, the situation was clearly different when it came to the application of that national law on citizens of an occupied territory, who were in all circumstances entitled to the benefit of the rights accorded to them by international law. The Lagmannsrett had, however, no doubt that the accused themselves had believed that the national law was always binding and, therefore, they were considered to have acted under a misapprehension of law which in the circumstances then prevailing, must be regarded as excusable.

As the Lagmannsrett had found that neither the procedure nor the meting out of the punishment by the Standgericht in respect of Dr. Saethre, Advokat Vislie, Advokat Gjerdrum and Sundby could be regarded as a violation of international law, they were acquitted on this Count.

The Lagmannsrett then discussed whether the Standgericht's trial of the fifth person referred to in the Indictment, Aage Martinsen, constituted a violation of international law. Attention was drawn to the fact that the Prosecution had maintained that Article 3 of the German Verordnung of 12th October, 1942 (previously quoted), according to which Aage Martinsen had been convicted, was in itself at variance with international law. The Lagmannsrett pointed out that there were different and contradictory opinions among legal experts as to whether a provision of that character was at variance with international law. The Lagmannsrett observed that international law did not contain any express provisions on that particular question. Reference was made to the fact that the British during the Boer War had introduced regulations declaring punishable the failure to denounce to the British authorities people who they knew were in illegal possession of

arms. Reference was also made to the fact that in Article 3 of the Regulations issued by the British Occupation Authorities in Germany, it was considered lawful to sentence to death people for not denouncing contemplated attacks which could endanger the Allied armed forces. The Lagmannsrett ruled that in these circumstances Article 3 of the said German Verordnung could hardly be regarded as a violation of international law. Furthermore, even on the assumption that that provision was at variance with international law, the accused had acted under an excusable misconception of law which must lead to their acquittal on this Count. The Lagmannsrett felt satisfied that Aage Martinsen had admitted to the knowledge of the intended acts of sabotage in question and that he had expressed his sympathy with them. When sentencing Martinsen to death, the Standgericht had taken into consideration his duties as a member of the indigenous police force, in which capacity he was under a special obligation to inform the authorities of any acts of sabotage. The Lagmannsrett held that in these circumstances the passing of the death sentence on Martinsen could not be regarded as disproportionate.

One of the lay judges of the Lagmannsrett was of the opinion that all three accused must be regarded guilty on both counts in so far as the passing of the death sentences for the acts in question could not be justified and in that they had passed the death sentences against their better judgment although they had acted under duress. He accordingly voted for their conviction and for the imposing of a term of imprisonment.

14. VERDICT OF THE LAGMANNSRETT, PRONOUNCED ON 20TH JANUARY, 1948

All three accused were found not guilty and acquitted.

15. THE PROSECUTION'S SECOND APPEAL TO THE SUPREME COURT

The Prosecution once more filed an appeal with the Supreme Court against the judgment and verdicts of the Lagmannsrett. The Prosecution's appeal reads in pertinent parts as follows :

" I. In its judgment the Lagmannsrett states, *inter alia* :

" It has not been established by the Prosecution that the accused " (before the Standgericht) " were *not* on the whole guilty of the acts for which they were convicted, which acts could, according to the German provisions then in force, lead to the passing of the death sentence. The evidence also seems to indicate that they had been active members of the underground movement. As to Gjerdrum it must be regarded as proved that he, in collaboration with von Edelstam, had been active in helping people to escape from the country. As to Sundby it has been proved that he was a detachment leader of the underground Military Organisation and had been engaged in comprehensive patriotic activities. As to Saethre it has been proved that he had supported the underground movement, and he had, during the trial before the Standgericht, partly admitted that he had impeded the security measures imposed by the police. Vislie had admitted before the Standgericht that he had given financial support to teachers and the clergy. The Prosecution has not proved that his financial support had been confined to these circles and the Standgericht had based its decision

on the assumption that his support had had a wider scope. There could be no doubt that Vislie had been an active member of the underground movement and was known to be so on the place where he lived."

" These arguments," the appeal went on, " were based on a wrong interpretation of international law insofar as :

" (*a*) The arguments seem to be based on the assumption that it is sufficient for a conviction according to international law that the accused have on the whole been guilty of acts which, according to the German provisions then in force, could lead to the passing of the death sentence. That is not true as those provisions cannot be applied to persons who had themselves opposed—or helped others to oppose or escape persecution which had been instigated by the occupation power in violation of international law.

" It appears from the judgment that Vislie at any rate had been convicted for such acts as financial support to teachers and the clergy. The fight of the teachers and the clergy was a fight against the persecution instigated by the occupying power in violation of international law. The same applies to Gjerdrum who had been convicted among others for having hidden students. The students had to flee in order to escape a persecution instigated against them by the occupation power at variance with international law. Insofar as Gjerdrum had helped students, his activities could not be regarded as an offence according to international law.

" (*b*) The arguments seem to be based on the assumption that it is sufficient for a conviction according to international law that the accused had committed certain punishable acts, irrespective of whether they had actually been charged with those particular acts before the Standgericht. Such an assumption is wrong, as it must be deemed to be a minimum requirement that the charges be made known to the accused at the trial.

" In any case it did not appear clearly from the parts of the judgment quoted above, whether the Lagmannsrett had based its findings on the correct interpretation of law as indicated above under (*a*) and (*b*). It must, therefore, be considered to be a mistake in the application of procedural law that the Lagmannsrett did not go further into these rules of substantive law. As regards Saethre and Gjerdrum, evidence had been submitted to the Lagmannsrett which showed that they had been sentenced by the Standgericht for acts which the occupation power was not allowed by international law to declare punishable, namely, in the case of Saethre, for having helped arrested Jews, and, in the case of Gjerdrum, for having helped students to flee the country, after the instigation of the persecutions against them. It is alleged to be a mistake in the application of procedural law that the Lagmannsrett failed to go further into the question as to whether or not Saethre and Gjerdrum could legally have been convicted for such acts. In the case of Vislie the judgment stated that ' He had given financial support to teachers and the clergy.' It is alleged to be a mistake in the application of procedural law that the Lagmannsrett failed to go further into the question as to whether or not Vislie could legally have been sentenced for such acts.

" II. The Prosecution maintains that during a trial before the courts of the occupying power oral information given to the German Security Police, or written reports submitted by agents or Germans, or depositions from

other persons who have been interrogated, may not be admitted as evidence unless the accused are permitted to peruse such evidence in its entirety. Extracts from such reports or indirect oral information should not be admitted as evidence. Information which did not reveal its source may in no case serve as a basis for conviction according to the principles of a fair trial. Even on the assumption that indirect evidence may be admitted, it must be regarded to be a minimum demand that the court and the accused shall have access to such evidence in the form in which it appears before the Prosecution. It must be considered an essential demand that the courts of the occupying power have the opportunity to scrutinise and sift and independently adjudge the evidence presented. A different conception of law would be contrary to the principles of international law as expressed in the Introduction to the Hague Convention No. IV of 1907.

" In the Judgment of the Lagmannsrett the following appears :

> " ' Weiner acted in a double capacity during the trial. He had obtained his information partly from German investigators, who, because of the unruly situation after the liquidation of the Chief of Police, Martinsen, were busy in their fields of work, partly from Norwegian agents. For security reasons the Prosecutor was prevented from letting the latter witnesses appear in person, but he had referred to the reports in his possession and quoted from them. Accused No. 1 [Latza] had reminded Weiner of his responsibilities as a police officer and according to his oath of office, and it has been stated that Weiner, in pleading the Prosecution's case, had given the impression of clearness and conviction. The Court [*i.e.*, the Lagmannsrett] cannot regard it an indispensable principle that the evidence, in order to meet with the requirements of international law in respect of court procedure, must be direct, and that the decision of the court cannot be based on reports and the like. For ordinary courts-martial such as the Allies had set up in occupied Germany it had thus been laid down that both oral and written evidence may be used. In exceptional cases submission of evidence may, for security reasons, be denied (Military Government Gazette, Germany, p. 15).'

" The way in which the Lagmannsrett had expressed itself on these points seems to indicate that it has based its arguments on a wrong conception of law.

" In any case does it not appear as clearly as one could have wished from the reasons given by the Lagmannsrett on what interpretation of law it had based its arguments on this particular point. This constituted a mistake in the application of procedural law. It is in particular alleged to be a mistake in the application of procedural law that the Lagmannsrett has failed to go further into the question under what circumstances and in what way such indirect evidence could legally have been admitted and accepted in the case in hand.

" III. In the case of Aage Martinsen the Lagmannsrett has based its decision on the assumption that the provision contained in Article 3 of the Reichskommissar's Verordnung of 12th October, 1942, is in accordance with the laws and customs of war. This is considered to be wrong and inconsistent with the basic principles of human justice as accepted by all civilised nations and as expressed in the preamble to the Hague Convention

No. IV of 1907, as well as with the principles laid down in Articles 23 i.f., 44, 45 and 46 of the Regulations regarding land warfare. Of particular importance is Article 44 which reads :

> " A belligerent is forbidden to compel the inhabitants of territory occupied by it to furnish information about the army of the other belligerent, or about its means of defence."

" In pronouncing the decision of the Supreme Court in the case against Gerhard Flesch,(1) the first Judge to give his reasons held, with the support of the remaining Judges, that the fight of the underground home forces was in accordance with international law. It may be concluded from this that the information demanded from Aage Martinsen concerned measures of defence, which were legal according to international law as laid down by Article 44. The argument of the Lagmannsrett that the legality according to international law of such a provision [*i.e.*, Article 3 of the above-mentioned Verordnung] was disputable, is considered to be wrong. The fact that similar provisions were in force in Germany at present, could not be considered decisive, as Germany was no longer a belligerent country.

" It is in any case considered to be a mistake in the application of procedural law that the Lagmannsrett failed to discuss the importance and bearing of the rules of international law referred to above.

" IV. The Prosecution maintains that a possible misconception of law on the part of the judges [*i.e.*, the accused] cannot be considered excusable. We are dealing here with principles of fundamental importance for the relationship between the occupation power and the citizens of the occupied territory, principles which in particular have a bearing upon the administration of justice by the occupation power. The Lagmannsrett's argument that a misconception on this point is excusable, is based on a wrong interpretation of law. . . .

" V. Subsidiarily it is submitted that the Lagmannsrett has based its finding on an erroneous interpretation of law when stating that the meting out of punishment is always a matter of discretion. Even on the assumption that the accused [*i.e.*, the accused before the Standgericht] could legally be punished for the acts with which they had been charged, it is maintained that the passing of the death sentence in all five instances was so exorbitant as to constitute a denial of justice."

16. ADDITIONAL DOCUMENTARY EVIDENCE BEFORE THE SUPREME COURT ON CERTAIN QUESTIONS OF LAW

In order to throw more light on the provisions applied and the practice followed by British Courts during the Boer War and in the British Zone of Occupation in Germany after the end of the Second World War in respect of failure on the part of citizens of the occupied territory to report to the occupation authorities on contemplated acts of sabotage, etc., referred to by the Lagmannsrett, the following exchange of minutes took place between the former Norwegian Representative to the United Nations War Crimes Commission, and the British Authorities concerned on the request of the acting prosecutor. The minutes issued by these British Authorities were

(1) See Volume V, pp. 111-120.

admitted in evidence by the Supreme Court. The minutes exchanged are in pertinent parts quoted below under (*a*) and (*b*).[1]

(*a*) *Exchange of Minutes relating to Regulations and Practice during the Boer War*

Letter of 27th July, 1948, from the former Norwegian Representative on the United Nations War Crimes Commission to the Under-Secretary of State, British War Office :

> " . . . It is alleged by the Prosecution that the three defendants in their capacity as president and members respectively of a Standgericht in Oslo, at the beginning of 1945, had committed war crimes in that they unlawfully and at variance with the recognised principles of international law had, through denial of a fair trial and miscarriage of justice, caused the death of a number of Norwegian citizens. Among the victims was one young Norwegian police constable who was sentenced to death and executed because he had failed to denounce his two brothers-in-law, who he knew were guilty of certain acts of sabotage directed against the German interests in Norway, and who were also sentenced to death by the Standgericht at the same trial.
>
> " In finding the defendants ' Not Guilty ' on this latter point, the Trial Court (Eidsivating Lagmannsrett) made reference to the fact that the British Authorities during the Boer War had introduced regulations providing for the death penalty for a similar conduct (*i.e.*, failure to report or denounce certain criminal activities endangering the security of the British Forces). The British Regulations referred to seem to have been the Martial Law Regulations of 1901, as amended in 1902. They are cited by Spaight : ' War Rights on Land,' p. 341, Section 1, para. 2, which reads as follows : ' Persons knowing of other persons being in possession of arms, etc., were liable to punishment for not informing the military authorities.' Article 25 reads : ' Persons failing to report the presence of the enemy or giving the enemy information, money, food, etc., are to be punished.'
>
> " The Prosecution is very anxious to be informed whether or not these provisions were ever actually applied by the British Courts-Martial during the Boer War, and if so, whether or not the death sentence was ever passed and executed as a result of proceedings pursuant to such charges. If death sentences have been passed, the Prosecution would appreciate it very much if it could be informed of particulars of any such cases."

Letter dated 17th August, 1948, from the Judge Advocate General's Office to the Norwegian Representative on the United Nations War Crimes Commission :

> " Your minute addressed to the Under-Secretary of State dated 27th July, 1948, has been passed to us for reply, and it is hoped that the following information may be of assistance to you and the Supreme Court of Norway.

(1) It is considered to be of importance to report this evidence because it throws light on the question of whether or not a provision like Article 3 of the German Verordnung of 12th October, 1942, according to which a citizen of an occupied territory may be sentenced—even to death—for failure to denounce his compatriots to the occupying authorities, is valid according to international law.

" 1. This office has had made available to it the official papers relating to the administration of martial law in South Africa, which have been procured from the War Office library. From an explanatory memorandum in these papers it appears that ' the invasion of Natal and Cape Colony by Boer Forces of the Transvaal and Orange Free State necessitated the proclamation of martial law in the districts invaded.' The first Army Order on the subject of martial law in these areas was published on 7th December, 1899, and this order indicated that a memorandum on the subject of the rules for the administration of martial law was being issued to all concerned. By January, 1900, 14 cases only appear to have been tried by military courts, the most severe sentence being imposed being one of five years for high treason and rebellion by aiding and abetting the enemy in the destruction of a river railway bridge.

" 2. On the 1st May, 1901, the General Officer Commanding Cape Colony District distributed a pamphlet dealing with martial law and its administration, and set out the actual martial law regulations. This pamphlet indicated that the persons to whom the proclamation of martial law was applicable were all persons within the proclaimed areas who were not subject to military law. Certain offences became triable by military court, *e.g.* :—' Being actively in arms against His Majesty or inciting others to take up arms against His Majesty, or actively assisting or aiding the enemy, or by committing any other act by which the safety of His Majesty's Forces or subjects is endangered.'

" 3. Breaches of the martial law regulations, except those which rendered the offender liable to trial by military court, were dealt with summarily by an officer or magistrate, who could impose a maximum of a £10 fine or imprisonment for 30 days.

" 4. By Regulation 3 of the martial law regulations it was provided as follows : ' Any one knowing of the fact of any person or persons having in their possession custody or control or on property occupied by them any firearms, ammunition, dynamite or other explosives as above (the person in possession, etc., not having reported the fact and not holding the required permit) is liable to prosecution if he or she does not inform the nearest military authority of the fact as soon as possible.'

" By Regulation 28 of the same regulations is provided (*a*) ' In regard to all offences under martial law regulations the officer or magistrate holding the preliminary investigation shall have jurisdiction and may impose penalties not exceeding £10 fine or 30 days' imprisonment or one or other of such punishments. (*b*) For any offence which may be dealt with by a military court the offender will be liable to death, penal servitude, imprisonment or fine.'

" 5. These regulations were published in the district of the Cape Ports on the 17th October, 1901, in an unaltered form. It will therefore be seen that the offence of failing to denounce a person for illicitly holding ammunition were not of the class of offences triable by a military court but summarily.

" 6. This office has also scrutinised the official statistics of cases

tried before military courts under these regulations and no case is shown in respect of the regulation in question for the simple reason that it was not triable before a military court. It therefore follows that the maximum penalty that could have been imposed, if it was ever imposed for such an offence, was a £10 fine or 30 days' imprisonment.

" 7. From a scrutiny of the cases in Cape Colony in which the death sentence was imposed, it appears that the classes of offences were high treason, murder and robbery, arson and marauding, etc.

" 8. An analogous offence of a negative nature, such as neglecting to give information to the military authorities attracted a fine of £25 according to the case records and further negative offences such as failing to report and withholding information of the presence of the enemy attracted a penalty of 18 months' hard labour. It will be appreciated that these offences were in respect of omissions that are not of the same class as failing to denounce a third person who is in possession of ammunition.

" 9. In conclusion, it may therefore be said that an offence under the regulation in question would not appear to have been triable before a military court at all, or if it was so triable, then it appears from the records that it was not so tried in fact."

Letter dated 3rd September, 1948, from the former Norwegian Representative on the United Nations War Crimes Commission to the Judge Advocate General :

" . . . The Prosecutor states in his letter [in which he acknowledged receipt of the letter quoted above] that on the basis of the information you have given, it now seems clear that the British, during the Boer War, regarded themselves justified according to international law to punish the population of South Africa for not imparting information to the British about the whereabouts of the Boer Forces. He agrees on the whole with the view expressed . . . . . , that delicts of the nature referred to above do not come into exactly the same category of *delicti per ommisionem* as that of not denouncing a person for being in possession of arms or ammunition. The difference here, he maintains, is, however, probably of a rather quantitative than qualitative nature, if such an expression can at all be used in this connection. The Prosecution expects the Defence to make the objection that, considering the development in modern partisan warfare, two or three saboteurs form in fact a hostile unit and if a person knowingly omits to report its whereabouts to the occupying power, he may, based on what has been said before, be punished for not having imparted the information. . . . The acting Prosecutor has asked me to approach you once more with the view to establishing, if possible, in what circumstances the sentence of 18 months' hard labour, referred to in your letter, was passed for failure to give information to the British authorities about the movements of enemy forces. It would be particularly interesting to know whether those sentenced committed the offences in territories where the occupation was not yet completed and where war operations were still going on or could still be expected to take place. The Prosecutor feels that the factual circumstances in these instances may be such as to help to explain and clarify these convictions. . . ."

Letter dated 8th September, 1948, from the Judge Advocate General to the former Norwegian Representative on the United Nations War Crimes Commission :

" With reference to your minute dated 3rd September, 1948. I have now caused inquiries to be made in the library and records of the War Office in an endeavour to secure for you the further information required in the last paragraph of your minute now being acknowledged.

" 1. I have now ascertained that the War Office holds only the statistics of the trials for military courts under the martial law regulations in force during the Boer War in Cape Colony and the other provinces, but the actual proceedings of such trials are no longer available. It is therefore apparent that I am not in a position to give you details of the circumstances in which the offence was committed for which a sentence of 18 months' hard labour was imposed for failure to give information to the British authorities about the movement of the enemy, that is, Boer forces.

" 2. No doubt you will be the first to appreciate that there is a considerable difference between failure to disclose the movements of rebel troops in a colony where there has been a revolt and the circumstances which arose in Norway in your case where one Norwegian civilian failed to denounce his brother-in-law for being an active member of the Norwegian Resistance at a time when Norway was an independent sovereign state merely occupied by the German Military. Such was far from the circumstances in which the Boer War operations took place as a reference to any authoritative work on the Boer War will clearly show.

" 3. It is regretted that in this minute I can be no more specific than this, but I can only emphasise that many of the defendants before the British Military Courts were naturally British Subjects as it was a revolt in a British colony and an invasion of such colonies by Boer forces that led to the proclamations of martial law now in point."

(*b*) *Exchange of Minutes relating to Regulations and Practice in the British Zone of Germany*

Letter dated 27th July, 1948, from the former Norwegian Representative on the United Nations War Crimes Commission to the Foreign Office, German Internal Department :

" . . . It is alleged by the Prosecution that the three defendants " (in the Latza case) " in their capacity as president and members respectively of a Standgericht in Oslo, in the beginning of 1945, had committed war crimes in that they unlawfully and at variance with the recognised principles of international law had, through denial of a fair trial and miscarriage of justice, caused the death of a number of Norwegian citizens. Among the victims was one young Norwegian police constable who was sentenced to death and executed because he had failed to denounce his two brothers-in-law who he knew were guilty of certain acts of sabotage directed against German interests in Norway, and who were also sentenced to death by the Standgericht at the same trial.

" In finding the defendants ' Not Guilty ' on this latter count, the Trial Court (Eidsivating Lagmannsrett) made reference, and attached

considerable importance to the fact, that the Allied Authorities after this war, had introduced in their respective occupation zones in Germany regulations which provided for the punishment of persons failing to report to the occupation authorities certain subversive actions, cf. Military Gazette, Ordinance No. 1, of 16th August, 1945, Art. 39.

" The Prosecution is, of course, aware of the fact that the legal status according to international law of occupied Germany and the powers of the Occupying Authorities differ substantially from those appertaining to territory provisionally occupied by an enemy whilst the war is still going on. Nevertheless, the Prosecution considers it to be of great importance to the outcome of the pending trial to be informed whether or not death sentences have been passed and executed according to these provisions for *delicti per ommissionem* and if so, to be informed of particulars of any such cases. . . ."

Letter dated 4th August, 1948, from Foreign Office, German Internal Department, to the former Norwegian Representative on the United Nations War Crimes Commission :

" I am answering your letter of 27th July about prosecution for failure to inform occupying powers of acts of sabotage. There are two main points I should make :

(1) That Section 39 of Ordinance No. 1 falls under Article II of the Ordinance, that is to say offences punishable by such penalty *other than death* as a Military Government or Court may impose.

(2) That the actual wording of the Section is ' aiding, or failing to report any person known to be wanted by the Allied Forces.'

" You will see from (1) above that there is no question of any executions having taken place. I am advised that the words ' known to be wanted ' imply that some notice must have been given by the Allied Force of their desire to apprehend the wanted man, and that failure to denounce a saboteur could not be included under this article.

" It may be of interest to you to know that Germans have been prosecuted for denouncing their fellow Germans to the Nazis, and that the Allies therefore discourage rather than encourage denunciations.

" If you would like to know the number of convictions of Germans under Article II Section 39 of Ordinance 1, I will gladly inquire. . . ."

Letter dated 16th August, 1948, from Foreign Office, German Internal Department to the former Norwegian Representative on the United Nations War Crimes Commission :

" You will recall our telephone conversation about prosecutions for failure to inform occupying power of acts of sabotage. I can now let you have the complete information as far as is possible.

" First, as I said in my letter of 4th August . . . Section 39 Article II of Ordinance No. 1 in the British Zone of Germany does not cover such an offence but only failing to report any person *known* to be wanted by the Allied Forces.

" Secondly any offence under it is punishable to such penalty *other than death* as a Military Government Court may impose.

" Finally, no prosecution or at most very few indeed have ever been instituted under it. I am sorry that I cannot be more precise, but it would take a disproportionate amount of labour to go through all our case records in Germany which have unfortunately not been classified throughout the period of occupation. During the time they have been classified there is no trace of any such prosecution, and inquiries amongst the persons concerned with prosecutions during the earlier part of the occupation has revealed no known case. Owing to changes in personnel, I cannot say definitely that there were no such cases before the classification of records, but it appears highly probable that if there were any, sentences were very light, since no prisoner still in custody was sentenced for such an offence."

Letter dated 14th September, 1948, from the former Norwegian Representative on the United Nations War Crimes Commission to the Foreign Office, German Internal Department :

" . . . There is, however, another Section (3) of the same Article " (*i.e.*, Article II of Ordinance No. 1 for the British Zone of Germany) " about which the Prosecution would be grateful to have some information.

" Section 3 reads as follows : ' Communication of information which may be dangerous to the security or property of the Allied Forces or unauthorised possession of such information without promptly reporting it, and unauthorised communication by code or cypher. . . .'

" According to Section 39, aiding or failing to report any person known to be wanted by the Allied Forces is punishable.

" The Prosecution would be most grateful to learn whether or not this provision (Section 3) implies that a German citizen is under unconditional legal obligation to impart to the Allied Occupation Authorities information which he more or less incidentally has gathered, provided the failure to give such information is apt to endanger the security of the Allied Forces or their property. In other words, whether Section 3 has a wider scope than Section 39."

Letter dated 21st October, 1948, from Foreign Office, German Internal Department to the former Norwegian Representative on the United Nations War Crimes Commission :

" I am directed by Mr. Secretary Bevin to reply to your recent inquiry about the interpretation of Section 3 of Military Government Ordinance No. 1 promulgated in the British Zone of Germany.

" I am to say that Mr. Bevin would have been happier to have been able to quote the ruling of a Control Commission Court on the interpretation of this Section. After exhaustive research, however, in the British Zone of Germany it has been found that no German has been charged under that Section as far as can be ascertained. No Control Commission Court has, therefore, ruled whether any given set of facts constitutes an offence under that Section or not.

" Mr. Bevin appreciates that the Norwegian Supreme Court would have preferred a judicial decision in this matter. In default of one I am to say that it is the opinion of Mr. Bevin's Advisers that the second limb of the paragraph is the one which is relevant to the case against

Hans Latza *et al.* It is true that Section 3 is in very wide terms and on the face of it the second limb would appear to make it possible to prosecute someone who, for example, overheard two other persons planning to carry out an act of sabotage and failed to report it. It would, however, be contrary to the principles of English legal interpretation to stretch a general provision like Section 3 and apply it to circumstances for which a limited and specific provision is included in the same Law or Ordinance. Now Section 39 of this same Ordinance No. 1 is the provision which deals with the reporting of persons—as opposed to information—and that provision is limited to persons known to be wanted by the Allied Forces. It is, therefore, very unlikely that a prosecution for failure to denounce could successfully be brought in a Control Commission Court under Section 3. . . ."

17. FINAL JUDGMENT OF THE SUPREME COURT, DELIVERED ON 3RD DECEMBER, 1948

Judge Berger, who expressed the unanimous opinion of the Supreme Court Judges, first dealt with the Prosecution's contention that the reasons given by the Lagmannsrett were on several points not sufficient to show whether or not the Lagmannsrett had based its decision on the right interpretation of law. In his opinion this point of the appeal had to be rejected because the elaborate reasons given by the Lagmannsrett were sufficient for the Supreme Court to decide whether or not a correct interpretation of law had been applied.

Judge Berger then turned to the Prosecution's contention that the German tribunal in question was not a Standgericht in the proper sense of that term, and that, in the circumstances then prevailing, a Standgericht was not competent to deal with the case. Judge Berger did not find it necessary to go into this question as this point was not covered by the Indictment. Furthermore, he made reference to the following observations made by Judge Schei, who was the first Judge to give his opinion when the Supreme Court delivered its previous Judgment on September 16th, 1947 : " I do not find it necessary here to go into the question, raised by the Prosecution before the Supreme Court, as to whether the Tribunal, which was set up, was actually a Standgericht in the proper sense of the term, and, if so, whether a trial before a Standgericht was permissible according to international law in the circumstances then prevailing and for cases of the kind in question, or whether the tribunal instituted was actually a special court set up for a particularly speedy and efficient dealing with those cases selected for trial. In my opinion what is decisive is not whether the tribunal belonged to this or that category, but whether the procedure before the tribunal met with the minimum demands which form the prerequisites for proper court proceedings—in the first instance whether the tribunal as an independent court took its decision after a fair investigation of the question of guilt, or whether the outcome of the trial was predetermined by directives given to the tribunal."

Judge Berger then mentioned that the Prosecution had maintained that the accused Latza's subsequent conduct in connection with the confirmation of the sentences by the " Gerichtsherr," which took place over the telephone, showed his unfairness in dealing with the case. Judge Berger

did not find it necessary to deal with this point as it was covered neither by the Indictment nor the Appeal.

Judge Berger observed that the Prosecution's appeal was in the first instance based on the assertion that the Lagmannsrett had wrongly found it sufficient that the accused before the Standgericht had been guilty of acts, which, according to German provisions then in force, could lead to the passing of death sentences. It was contended by the Prosecution that these German provisions could not be brought to bear on citizens of an occupied country who by their acts had only resisted persecution instituted by the occupation power in violation of international law. In Judge Berger's opinion this point of the appeal could not be accepted. He drew attention to the fact that Dr. Saethre, Advokat Vislie, Advokat Gjerdrum and Director Sundby were, according to what the Lagmannsrett had established, sentenced also for having committed other acts than those enumerated in the appeal, namely for help rendered to the students, the teachers and the clergy—on a basis which was unquestionable according to international law. Judge Berger, therefore, did not find it necessary to elaborate upon the question to what extent the illegal persecution instituted by the Germans against these groups of persons, justified the resistance resorted to by the Norwegians. In this connection Judge Berger only wished to observe that it did not follow from the fact that the resistance movement was held to be consistent with international law, that its members had the benefit of the protection of international law.

As to the contention that the Lagmannsrett had based its decision on the supposition that it was sufficient for their conviction that the accused before the Standgericht had been found guilty of certain punishable acts, regardless of whether or not they had been formally charged with these acts before the Standgericht, Judge Berger observed that in his opinion it appeared clearly from the premises of the Lagmannsrett's Judgment that the Lagmannsrett had found it proved that the accused before the Standgericht had in fact been served with the charges made against them.

Judge Berger then turned to the contention made by the Prosecution that the procedure before the Standgericht did not constitute a fair trial. The Prosecution had in particular maintained that the way in which the evidence had been procured and submitted was illicit as the German prosecutor had cited reports from persons whose names had not been revealed, without letting the accused make themselves acquainted with the evidence in its entirety. In this connection Judge Berger observed that a series of weighty objections could be made against the way in which the Standgericht had conducted the trial. He particularly pointed out that the charges made against the accused before the Standgericht had not been put down in writing beforehand, that the accused had not been assisted by a counsel for the defence, that the evidence presented and accepted had been of an indirect nature only, that the proceedings had taken a short time and were of a summary character, and that the confirmation by the "Gerichtsherr" seemed to have been procured and prepared in a very superficial way. Judge Berger found that these shortcomings could not be justified by a reference to the fact that it was considered to be desirable for the Germans to have the trial finished with as soon as possible. He thought that these shortcomings deserved very strong criticism and were likely to throw doubt on

the tenability of the trial as a whole. Judge Berger could, nevertheless, not find that any of these shortcomings, individually or all of them together, were decisive in themselves. What was above all decisive in his opinion, was whether there had been a fair trial before independent judges who delivered their judgment according to their free conviction. In this connection Judge Berger stressed that the Lagmannsrett had established that the Standgericht went through each and every charge with the accused and that they were given full opportunity to explain themselves. It also appeared from the Judgment of the Lagmannsrett that the accused before the Standgericht had partly admitted charges brought against them. This procedure might have been considered to be sufficient by the judges of the Standgericht.

Judge Berger concluded that the question as to whether or not the trial before the Standgericht had been a fair one, depended in fact on circumstances, regarding the presence of which the Lagmannsrett, upon the evidence presented, and in particular after having heard the detailed explanations given by the accused, had had the best possible material to judge ; the Supreme Court was in possession of no material sufficient to set aside the Lagmannsrett's discretionary finding on this particular point.

Judge Berger then went on to deal with the Prosecution's contention that Article 3 of the Reichskommissar's Verordnung of October 12th, 1942, according to which Aage Martinsen had been sentenced to death for failure to denounce his two brothers-in-law for certain contemplated acts of sabotage, was in clear violation with international law and the Hague Convention No. IV of 1907, in particular Article 44 of the latter. Judge Berger pointed out that in his opinion neither Article 44 nor any others of the provisions of the Regulations of Land Warfare, referred to by the Prosecution, could be directly applied in the present case. In his opinion it would have been more consistent with the laws of humanity and the dictates of public conscience to veto the imposition of punishment for a failure to impart to an occupation power information on the activities of a patriotic movement. He did not venture to claim, however, that this view had already been established as an unquestionable rule of international law. In this connection Judge Berger made reference to what had been maintained by the Lagmannsrett in its first Judgment delivered on 12th March, 1947. He also made reference to what had been maintained by Professor Castberg in his expert opinion submitted to the Lagmannsrett during the re-trial in which he said :

> " The provision contained in Article 3 of the Verordnung " (referred to above) " for the punishment of failure to impart information regarding activities against the occupying power, can, in my opinion, hardly be justified from the point of view of international law. It seems hardly possible to reconcile a demand for denunciation of this kind with the principle laid down by Article 52 of the Hague Regulations of Land Warfare, which forbids the occupying power to demand from the population of the occupied country that they shall take part in war operations against their own country. In so far as imminent actions by regular forces, belonging to the enemy of the occupying power, is concerned, it is maintained by Rolin" (Alberic Rolin : 'Le Droit Moderne de la Guerre,' Volume I, p. 461) " that inhabitants of the occupied country cannot be punished for failure to impart the knowledge of which

they might have got possession. At the same time Rolin states, however, that it is more doubtful whether such duty to denounce may not be imposed insofar as imminent acts, inconsistent with international law, by irregular combatants are concerned. He is himself of the opinion that nothing beyond passivity can be demanded from the population. I, for my part, agree with this view. However, the fact that this question has been considered to be doubtful by an author of Rolin's authority, may no doubt be of importance when it comes to the reconsideration, in the light of criminal law, of the sentence passed by the Standgericht on Aage Martinsen."

With reference to this Judge Berger held that the accused could not be punished for having applied the said German Verordnung in the case before the Standgericht.

Judge Berger finally dealt with the Prosecution's contention that the passing of the death sentences by the Standgericht on all five persons referred to in the Indictment was in any case so exorbitant that it must be considered tantamount to a denial of justice. Judge Berger observed that he could not agree with the Prosecution on this point. He maintained that from the German point of view it must have been considered to be of particular importance that severe punishment be inflicted in order to stem the Norwegian resistance, taking into consideration the peculiar circumstances then prevailing.

Judge Berger concluded by voting for the rejection of the appeal.

The remaining Judges of the Supreme Court : Fougner, Soelseth, Krog and Stang concurred with the opinion expressed by Judge Berger and supported the vote.

18. FINAL DECISION BY THE SUPREME COURT

By decision of the Supreme Court, pronounced on 3rd December, 1948, the judgment and findings of the Lagmannsrett was upheld and the Prosecution's appeal rejected.

B. NOTES ON THE CASE

The two questions of most importance raised in the *Latza Trial* were (i) that of the legality under international law of the enforcement of a provision punishing failure, on the part of inhabitants of occupied territory, to impart information to the occupying power regarding the activities of other inhabitants against the occupying power ; and (ii) the requisites of a fair trial under international law.

The Lagmannsrett, when the case first came before it, was of the opinion that the enforcement of a provision punishing failure to denounce was illegal under international law,(1) but the question was left in doubt in the Supreme Court by Judge Berger, who apparently felt that, since the question was regarded by expert opinion as being in doubt, he was not entitled to hold that the accused could be guilty of a war crime in that they enforced the German Verordnung prescribing punishment for failure to denounce.(2)

(1) See pp. 58 and 59-60 ; compare pp. 69-70.

(2) See p. 83.

The question of the denial of a fair trial to Allied victims has already received attention in Volume V of these Reports, pp. 73-77, and in Volume VI, pp. 96-104. In the present trial, the Lagmannsrett held that it was evidence of the denial of a fair trial that, for instance, certain Allied accused before a German court were not given defence counsel and acquainted with the charges made, were arrested on the day of trial and were not able to prepare and present a defence, and were sentenced to death on insufficient evidence for acts which in any case, from the point of view of international law, were hardly punishable by a death sentence.(1) The facts just described bear a strong resemblance to some of the facts which have been regarded by other Allied courts as constituting evidence of a fair trial, as set out in Volumes V and VI.

The Supreme Court, however, while holding that proof of a fair trial was necessary before killings of Allied victims such as were alleged could be regarded as legal,(2) was content to define the concept of a fair trial in very broad terms. The accused person must be given an opportunity to defend himself and present counter-evidence, and if a death sentence was based on manifestly insufficient evidence it was clearly contrary to the basic principles of justice as expressed in the Preamble to the Hague Convention No. IV of 1907. The decisive point was whether the trials before the Standgericht had fulfilled those minimum demands which were to be regarded as indispensable for a proper trial, primarily whether the Standgericht as an independant and impartial tribunal had reached its decisions after a thorough investigation of the guilt of the accused, or whether the outcome had been determined beforehand by directives given to the court.(3) Judge Berger held that, even if taken all together, the following facts did not decisively prove the denial of a fair trial: that the charges made against the accused before the Standgericht had not been put down in writing beforehand, that the accused had not been assisted by a counsel for the defence, that the evidence presented and accepted had been of an indirect nature only, that the proceedings had taken a short time and were of a summary character, and that the confirmation by the " Gerichtsherr " seemed to have been procured and prepared in a very superficial way.(4) Judge Berger stressed that the Lagmannsrett had established that the Standgericht went through each and every charge with the accused and that they were given full opportunity to explain themselves. It also appeared from the Judgment of the Lagmannsrett that the accused before the Standgericht had partly admitted charges brought against them. This procedure might have been considered to be sufficient by the judges of the Standgericht, and Judge Berger did not feel entitled to say that the Standgericht had made an illegal use of their discretionary powers.(5)

While the Supreme Court may be thought to have taken a view of the denial of a fair trial which was more favourable to persons accused of such

(1) See pp. 57 and 67-8.

(2) See pp. 63, 80 and 82. Judge Berger stressed that the important point was not the type of court which conducted certain proceedings but whether such proceedings constituted a fair trial; compare Vol. VI, pp. 94-6.

(3) See pp. 63 and 80.

(4) See pp. 81-2.

(5) See p. 82.

denial than the view taken by some other authorities,(1) its finding does serve to underline the truth of the statement made in the notes to the *Justice Trial*(2) that the denial of any one of the rights enumerated on pp. 103-104 of Volume VI would not necessarily amount to the denial of a fair trial, and the courts have had to decide in each instance whether a sufficient number of the rights which they have regarded as forming part of the general right to a fair trial were sufficiently violated to warrant the conclusion either that the offence of denial of a fair trial has been committed, or that the defence plea that a killing or other injury was justified by the holding of a previous trial has been disproved.(3)

(1) See again Volumes V and VI as cited on page 84.

(2) Vol. VI, p. 104, note (2).

(3) As to these two possible legal deductions see Vol. VI, pp. 102-103.

CASE No. 87

TRIAL OF JOSEF HANGOBL

GENERAL MILITARY COURT, DACHAU, GERMANY
17TH-18TH OCTOBER, 1945(1)

A. OUTLINE OF THE PROCEEDINGS

The accused was charged with a violation of the laws of war in that he "an enemy national, did, at or near Lamprechtshausen, Austria, on or about 16th November, 1944, wilfully, deliberately and wrongfully kill . . . a member of the United States Army, who was then unarmed and in the act of surrendering, by shooting him with a rifle."

The victim was a United States airman who had baled out of his aircraft and landed on Austrian territory. The accused, who was a member of an Austrian civilian defence formation called *Gauwehrmannschaft*, maintained that, on being told by a young girl that a flyer had baled out of a plane, he had set out to search for him, armed with a rifle. On finding the airman he called five times in a loud voice without any appreciable pause "Halt." As he called the fifth time the flyer put either his left or right hand inside his jacket or coat. Thinking that he might be about to draw a gun, the accused shot him. According to Hangobl, the airman then turned to run away, but was shot at again by the accused and fell to the ground. Hangobl confessed that he had not seen the victim in possession of a weapon.

Hangobl then left the scene to bring help and while he was away certain of his neighbours took the victim to a doctor, who sent him to a hospital after giving him treatment. He was then sent to a second hospital and was operated upon. He died after the operation because of internal bleeding. It was shown that the accused did not approach the neighbours referred to for help, and stated in Court that the reason for his walking in another direction was that they were busy harvesting. The alleged date of the shooting, November 16th, 1944, was not disputed.

The Court found the accused guilty of the charge, with the omission of the words "and in the act of surrendering," and sentenced him to be confined with hard labour for life.

A petition for review was filed on behalf of the accused on the grounds that the accused was a lawful belligerent, and that he acted in self-defence. The Reviewing Authority reduced the sentence to one of confinement for ten years with hard labour.

B. NOTES ON THE CASE

1. THE STATUS OF THE ACCUSED

The accused was, at the time of the shooting, a member of a civilian defence organisation existing in the neighbourhood of Innerfurth, Austria, called Gauwehrmannschaft. According to the accused, he "was a farmer

(1) This Report is based, not on a complete transcript, which was not available to the Secretariat of the United Nations War Crimes Commission, but on a summary received from the United States authorities.

at the time of the shooting and never was a soldier, but was a member of the District Defence Group at the time, but did not wear a uniform." He added that " no uniform or any other object patently identifying our organisation emblem was ever issued to us or to the other members thereof." He had received orders to capture enemy fliers and hand them over to the police.

It was shown that the organisation did not have any uniform or insignia. The unit drilled and did a little shooting practice on one Sunday a month. It was organised into a company and groups within the company, each of which had its leader. Some weapons had been issued, but they could not be carried publicly and after duty were stored in a weapons room. It was not a voluntary organisation, for the members were forced to join under the law. There was a standing obligation on its members to round up enemy fliers. On 6th November, 1944, all members of the Home Guard (Landwache) and Gauwehrmannschaft were registered for the Volksturm and the Gauwehrmannschaft was automatically transferred into the Volksturm, but the individual members were not sworn into the Volksturm until 10th December, 1944. The Volksturm issued its equipment on 20th December, 1944 ; consequently, the Volksturm was not fully organised until after 16th November, 1944.

Appearing as a witness for the Defence, a second lieutenant of the United States Headquarters Third Army, Judge Advocate Section, testified that he attended a Military Intelligence Training course at Camp Ritchie and had been engaged in interrogating and classifying prisoners of war for approximately one and a half years. The Gauwehrmannschaft, he said, was an old institution which was revived in 1939. The activities of the units varied, in some instances being only a Sunday outing club. Its primary purpose was to cope with any emergencies which might arise. Although no member of the Gauwehrmannschaft had been captured by the United States forces, the witness would have considered them prisoners of war. In his opinion, according to general directives, the Gauwehrmannschaft was a para-military organisation. He also stated that the organisation had no authorised distinctive emblem though some members wore S.A. brassards. In the Gau of Salzburg where the Gauwehrmannscahft unit involved was located, the Volksturm took over in the later part of November and December.

The Prosecution maintained that the accused was not a lawful belligerent since he did not comply with the four requirements of Article 1 of the Hague Convention No. IV of 1907, in that he did not wear a fixed distinctive emblem recognisable at a distance. Therefore Hangobl could not lawfully engage in combatant activities. At most the accused could act in self-defence and even on the basis of the accused's version of the incident, it was clear that he had used more force than was necessary in view of the fact that the victim was going away at the time the second shot was fired.

Article 1 of the Hague Regulations to which the Prosecution referred, provides that :

> " The laws, rights, and duties of war apply not only to the army but also to militia and volunteer corps fulfilling all the following conditions :
>
> (1) They must be commanded by a person responsible for his subordinates ;

(2) They must have a fixed distinctive sign recognisable at a distance ;

(3) They must carry arms openly ; and

(4) They must conduct their operations in accordance with the laws and customs of war.

" In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination ' army '."

It seems possible that the Court did indeed find that the accused had violated the laws of war by conducting hostilities while a civilian, and, if so, the decision is useful evidence of what constitutes the characteristics which would turn a civilian into a lawful belligerent. It will be noted that, while the accused's formation may be said to have had responsible commanders, it was not supplied with uniforms or other recognisable insignia and did not carry arms openly.

2. THE STATUS OF THE VICTIM

The Court must be taken to have found that the airman had not been shown to have been in the act of surrendering at the time of shooting. It would follow that he was not at that moment protected by the Geneva Prisoners of War Convention. The mere fact of having baled out does not automatically entitle an airman to prisoner of war rights.

There is not means of knowing definitely whether or not the Court found the accused guilty of a breach of Article 1 of the Hague Convention, and whether solely on that ground. There is some authority, however, for saying that a line could be drawn beyond which it was illegal even for a lawful combatant to go on carrying out hostile acts against airmen who parachute to safety behind their enemy's lines. It has been argued that an enemy whose aircraft has landed on territory held by the opponent may not be attacked if he does not continue to resist or try to escape for he will be captured in any event, but that he may be attacked if he continues to resist. Spaight in " Airpower and War Rights " (first edition, 1924) wrote, on p. 125, that if an aircraft comes down in ground held by the attacking airman's forces, and the occupants do not continue to resist or try to escape, it is obviously unnecessary to kill them, for they must be captured in any event.

There remains a third possibility that the Court may have found the accused guilty on the grounds that he showed negligence in the way in which he went about securing medical aid for the victim.(1)

(1) Regarding war crimes of omission committed by persons under a duty to take certain action (apart from the question of the responsibility of a commander for offences committed by his troops) see for instance Vol. I, pp. 91-2, and Vol. VII, pp. 78-81.

CASE No. 88

TRIAL OF HANS ALBIN RAUTER

NETHERLANDS SPECIAL COURT IN 'S-GRAVENHAGE (THE HAGUE)
(JUDGMENT DELIVERED ON 4TH MAY, 1948)
AND
NETHERLANDS SPECIAL COURT OF CASSATION
(JUDGMENT DELIVERED ON 12TH JANUARY, 1949)

Persecution of Jews and Relatives; Deportations; Slave Labour; Pillage and Confiscation of Property; Imposition of Collective Penalties; Arrests, Detentions and Killing of Hostages effected in "Reprisal" as War Crimes and Crimes against Humanity—Jurisdiction of Municipal Courts over War Crimes—The Rule "Nulla pœna sine lege"—Permissibility of Reprisals (Effect of an Act of Surrender; Right to Resistance of Inhabitants of Occupied Territory; Legitimate and Illegitimate Reprisals).

A. OUTLINE OF THE PROCEEDINGS

I. INTRODUCTORY NOTES

The accused, Hans Albin Rauter, was a Nazi S.S. Obergruppenfuehrer and a General of the Waffen-S.S. and the Police, who served during the occupation of the Netherlands as Higher S.S. and Police Leader (Höhere S.S. und Polizeiführer) and General Commissioner for Public Safety (General-Kommissar für das Sicherheitswesen) in the Occupied Netherlands Territories.

He was tried by the Special Court at the Hague, for a wide range of offences committed against the Dutch civilian population during the occupation, and on 4th May, 1948, was sentenced to death. The offences charged included persecutions of the Jews, deportations of inhabitants of occupied territory to Germany for slave labour, pillage and confiscation of property, illegal arrests and detentions, collective penalties imposed upon innocent inhabitants, and killings of innocent civilians as a reprisal for offences committed by unknown persons against the occupying authorities.

The accused appealed against the Judgment of the first court to the Special Court of Cassation, which passed judgment on 12th January, 1949. The death sentence of the first court was confirmed, with certain alterations made in regard to the solution given to a number of legal questions by the first court.

The trial of Rauter was one of the most important in the Netherlands, both as regards the type of crimes and the number of victims, and the legal issues to which it gave rise before the Netherlands courts. The judgments

reviewed include important findings which greatly contribute to the solution of certain problems which are of a complex nature in the sphere of international law, such as the issue of legitimate and illegitimate reprisals.

II. PROCEEDINGS OF THE FIRST COURT

1. *The Indictment*

The accused was charged with various offences, reviewed below, while " being in the forces and the service of the enemy and entrusted with the care for public peace and order, the command over the Waffen-S.S. units and the German police units and organs, the supervision of and giving orders to the Netherlands police in the occupied Netherlands territory, and while being in the course of the occupation vested with legislative powers in the sphere of public order and safety."

He was charged with having committed the offences concerned in violation of " the laws and customs of war and in connection with the war of aggression waged against, among others, the Netherlands."

The first charge concerned the persecution of Jews and was couched in the following terms :

> " The accused intentionally, in the framework of the German policy of persecution of the Jews, the object of which was to eliminate the Jews from Europe and exterminate them or at least a large number of them, which policy was already begun in the occupied Netherlands in 1940, insofar as this depended on him, took measures considered officially necessary for the success of this policy in the Netherlands, namely by issuing statutory provisions and supervising and directing the activities of the police subordinated to him, the general object being the segregation, congregation and arrest of the Jews as part of their deportation across the German frontier which, as the accused must have foreseen, resulted for many in their death, since according to data produced by the Red Cross, of the approximately 110,000 Jews who were deported only about 6,000 returned."

The second charge dealt with the recruitment of Dutch subjects and their deportation to Germany for slave labour. The charge read as follows :

> " The accused intentionally, in the framework of the German policy of the mobilisation of labour (Arbeitseinsatz), in so far as this depended on him, took measures considered officially necessary for the success of this policy in the Netherlands, such as having round-ups and raids carried out by the police subordinated to him with the object of apprehending those liable to labour service (ordered 15th July, 1943), introducing control by means of new rations registration cards . . . and setting up the ' Arbeitscontrolldienst ' . . . by which mobilisation of labour the workers seized from among the civilian population of the occupied Netherlands were deported to Germany with a view to slave labour, many of them dying as a result, at least 300,000 Netherlanders . . . having been driven away to Germany for labour service during the German occupation, some 9,900 having been seized in round-ups and raids between 7th January and 1st September, 1944, only and sent to that country through the transit camp at Amersfoort."

The third and fourth charges concerned pillage and confiscation of property :

" The accused intentionally, after the ruthless seizure of household contents belonging to Netherlands citizens who had done harm or shown themselves hostile to the occupying Power had been decided upon in the framework of the systematic pillage of the Netherlands population of household articles, clothing, etc., ordered by Goering in August, 1943, took the necessary measures that this was drastically carried out by the German police under his command, as a result of which from that time onwards such goods were stolen on a large scale from Netherlands citizens, while replacement at that time was not possible or practically impossible.

" The accused intentionally, by a Decree dated 13th May, 1943, ordered the confiscation of wireless sets in the occupied Netherlands territories and ordered that these be handed in, this order being reinforced by drastic threats which were supplemented in October, 1943, by the threat that the entire contents of a household would be confiscated, compelling in this manner many Netherlanders to surrender their sets and thus depriving them unjustly of their property."

The fifth charge dealt with the deportation of Dutch students to Germany :

" The accused intentionally, by raids held on 6th February, 1943 ; by a call to report which was accompanied by threats (against, among others, parents and guardians) on about 5th May, 1943 ; and by later arrests, apprehended a large number of Netherlands students and placed them at the disposal of the competent German authorities for deportation to Germany, about 1,800 students being seized in the raids in February, 1943 . . . while about 3,800 reported in May, 1943, and many others were apprehended later, a number of them dying as a result of the deportations."

The sixth charge concerned orders issued by the accused in August, 1942, to arrest and detain relatives of Dutch police officials leaving their service and going into hiding, as a result of which numerous members of such families were deprived of their liberty and kept in concentration camps.

Finally, the seventh and last charge dealt with a series of measures undertaken in reprisal against innocent inhabitants, and including collective penalties, illegal arrests and detentions, and the putting to death of hostages. The charge ran as follows :

" The accused intentionally, as a retaliation for acts directed against the occupying Power or regarded as being so directed, systematically applied the following measures :

(*a*) Collective fines imposed by him or on his behalf on municipalities as a result of damage done to cables and other individual acts for which the population as a whole could not be considered mainly responsible.

(*b*) Removal of contents from houses (at the same time pillage in the circumstances explained in the third charge, in particular pillage which took place after the introduction of the first measures).

(*c*) Arrest and imprisonment of innocent civilians (very often the next of kin of the person sought for) or carrying out of raids (also for the purpose of the labour service mentioned in the second charge) and removal of persons thus arrested, while it was a matter of common knowledge that the treatment received in German detention was, as a rule, very bad and resulted in the death of many individuals, a large number of those thus deprived of their liberty having in fact died.

(*d*) Reprisal murders of Netherlands civilians in the course of which :

1. Civilians were shot on or after arrest, or (especially after the Allied advance through France and Belgium) while they already happened to be in German custody for another act than that for which the reprisal murder took place ;

2. From September, 1943, the murder action, known as ' Silbertanne,' was carried out, this being an arrangement by which members of the Germanic (Netherlands) S.S., in collaboration with the Security Police, shot civilians as a reprisal for attacks on agents of the enemy, the prepetrators of which crimes (assassinations) were ostensibly not discovered ; by which policy carried out in this manner and more particularly by acts mentioned in the first, second, fifth, sixth and seventh charge, Rauter intentionally committed systematic terrorism against the Netherlands people."

2. *Facts and Evidence*

The evidence at the trial consisted of statements of witnesses and documents, including a very large number of reports, letters, decrees and other documents originating from the accused himself.

(i) *Position of the accused*

It was ascertained that the accused had been appointed Higher S.S. and Police Leader (Höhere S.S.-und Polizeiführer) in the Occupied Netherlands Territories by Hitler himself.

His position was only second to that of the Reich Commissioner (Reichskommissar) for the Netherlands, Seyss-Inquart, the highest Nazi officer in the occupied territory. Rauter held the position of General Commissioner for Public Safety (General-Kommissar für das Sicherheitswesen). As such he was in charge of the entire police forces in Holland, including the Netherlands Police, and had under his orders the heads of the most important branches of the German police, such as the " Befehlshaber der Sicherheitspolizei " (Commander of the Security Police), commonly known as " Sipo," the " Befehlshaber des Ordnungspolizei " or " Orpo " and the " Befehlsheber des Waffen S.S." The Security Police included the State Police (Staatspolizei or Stapo) and the Criminal Police (Kriminalpolizei or Kripo).

The accused's position of Higher S.S. and Police Leader and General Commissioner for Public Safety involved wide powers, one of which consisted of the authority to issue orders by decrees. He remained in office until the very end of the occupation of Holland, *i.e.*, until March, 1945.

The evidence produced showed the accused's guilt in the commission of all the classes or types of offences charged.

(ii) *Persecution of the Jews*

It was shown that the accused and the police forces under him took active part in the persecution of the Jews in the Netherlands.

The Court made reference to the general Nazi policy of persecuting Jews, as this was established by the International Military Tribunal at Nuremberg. The following passage from the Nuremberg Judgment was taken into account as evidence :

> " The Nazi persecution of Jews in Germany before the war, severe and repressive as it was, cannot compare, however, with the policy pursued during the war in the occupied territories. Originally the policy was similar to that which had been in force inside Germany. Jews were required to register, were forced to live in ghettoes, to wear the yellow star, and were used as slave labourers. In the summer of 1941, however, plans were made for the ' final solution ' of the Jewish question in all of Europe. This ' final solution ' meant the extermination of the Jews, which early in 1939 Hitler had threatened would be one of the consequences of an outbreak of war, and a special section in the Gestapo under Adolf Eichmann, as head of Section B4 of the Gestapo, was formed to carry out the policy.
>
> " The plan for exterminating the Jews was developed shortly after the attack on the Soviet Union.
>
> " . . . Part of the ' final solution ' was the gathering of Jews from all German occupied Europe in concentration camps. Their physical condition was the test of life or death . . . all who were not fit to work were destroyed in gas chambers and their bodies burnt."

It was shown that the accused carried out the above policy in Holland. He issued orders under which Jews were subjected to discriminatory treatment and gradually segregated from the rest of the population, which facilitated their being detected and apprehended at a later date for slave labour and eventual extermination. Jews were ordered to wear a Star of David in public, and were forbidden to take part in public gatherings, to make use of public places for amusement, recreation or information, to visit public parks, cafes and restaurants, to use dining and sleeping cars, to visit theatres, cabarets, variety shows, cinemas, sports clubs, including swimming baths, to remain in or make use of public libraries, reading rooms and museums. A special curfew was introduced for all Jews between the hours of 8 p.m. and 6 a.m. Later orders banned them from railway yards and the use of any public or private means of transport.

These measures were followed by the erection of concentration camps for Jews in various places. They culminated in systematic round-ups of Jews, who were sent to the concentration camps in order to be deported to Germany or Poland, where they were to be used for slave labour or exterminated. Numerous letters from the accused were produced as evidence. In a letter of 10th September, 1942, addressed to Himmler, the accused spoke of the first measures in the following terms :

> " The rounding up of the Jews is making us rack our brains to the uttermost. I will on no account fail to make use of any influence I may have for what is gone is lost. The mixed marriages have been classified up to 15th October, 1942, and so were the munition workers,

diamond cutters and so on, so that with this the great purge can begin in Holland. By that time both the big Jewish camps I have had built will be ready, one in Westerbork near Assen and one in Vught near 's-Hertogenbosch. I shall then be able to introduce 40,000 Jews into the two camps. I am harnessing up everything that can exercise police or assistant police functions, and anything anywhere that looks like belonging legally or illegally to Jewry will be put into both these camps after 15th October, 1942."

Two weeks later, in another letter to Himmler, dated 24th September, 1942, Rauter spoke of about 8,000 Jews who were detained in so-called " relief works camps," and of their relatives. In this connection the accused made the following report :

" On 1st October the relief works camps will be occupied by me at one blow and the same day the relatives outside them will be arrested and taken into the two large newly erected Jewish camps in Westerbork near Assen and Vught near 's-Hertogenbosch. I will try to get hold of 3 trains per week in place of 2. These 30,000 Jews will now be pushed off from 1st October onwards. I hope that by Christmas we shall have got these 30,000 Jews away too so that a total of 50,000 Jews, that is half, will then have been moved from Holland.

" On 15th October Jewry in Holland will be declared outlawed, that means that police action on a large scale will begin. . . . Every Jew found anywhere in Holland will be put in the large camps. As a result no Jew, unless a privileged one, will be seen any longer in Holland. At the same time I will start the announcements according to which Aryans who hide Jews or help them over the border, and who have forged identity papers, will have their property seized, and the perpetrators will be taken to a concentration camp ; all this in order to prevent the flight of the Jews which has started on a large scale."

The grip on the Jews in the Netherlands soon increased by circumscribing the areas in which they were allowed to reside. Those who had not already been apprehended were banned from one province after another and confined to a few areas where they could easily be caught. Thus, for instance, by decrees issued by the accused on 12th February, 1943, 29th March, 1943, and 13th April, 1943, the Jews were forbidden to live in Haarlem and district, and to reside in the provinces of Friesland, Drente, Groningen, Overijsell, Gelderland, Limburg, Northern Brabant, Zeeland, Utrecht, Zuid-Holland and Noord-Holland. The general policy of the accused was to deport the Jews chiefly to Eastern Europe, that is to extermination camps in Poland.

The results achieved were described by Rauter in a report of 2nd March, 1944, where he significantly used the following words :

" The Jewish problem in Holland properly speaking can be considered as solved. Within the next ten days the last full Jews will be taken away from Westerbork camp to the East."

In an earlier account, given to his subordinates, the accused had disclosed the following data :

" Everyone knows that we had about 140,000 full Jews here in Holland, including foreign ones some of whom we cannot get hold of

for international reasons. The question is to send Jewry in its entirety to the East : I can tell you here—and please do not report it outside—that up to date we have sent 50,000 Jews to the East and that there are still 12,000 Jews in the camps. That brings the lot to about 67,000 Jews who have already been eliminated from the Netherlands national life. From April 1st we hope to attain a greater speed in the removal of the Jews, in the sense that we shall then dispatch a train twice a week instead of once, so that we can deport 12,000 per month. We hope to have, within a measurable space of time, no more Jews freely walking the streets in the Netherlands."

The accused stressed in particular the need to apply measures ruthlessly and pitilessly, and used in this respect the following language :

" This is not a nice job, it is a dirty work, but it is a measure which, seen historically, will have great significance. . . . There is no room for tenderness or weakness. The one who does not understand this, or who is full of pity or silly talk about humanism and ideals, is not fit to lead in these times. . . And this is what is going to happen. Not one more Jew will remain in Europe."

One witness, the head of the Netherlands Red Cross department entrusted with establishing the fate of the Jews in Holland, gave the following account : during the occupation about 110,000 Jews were taken away from the Netherlands, of whom about 100,000 were of Dutch nationality. Of this total only about 6,000 returned after the war.

(iii) *Slave Labour*

The accused took also active part in the carrying out of the slave labour policy, in that he used the police forces under him to apprehend and deport Dutch subjects to Germany where they were to be forcibly used as workers in industry or agriculture.

The criminal nature of the Nazi slave labour scheme was established by the International Military Tribunal at Nuremberg. The Tribunal's findings concerning facts relating to that scheme as a whole were taken into account by the Netherlands Special Court as evidence. The following passages were among the references made to the Nuremberg Judgment :

" The German occupation authorities did succeed in forcing many of the inhabitants of the occupied territories to work for the German war effort, and in deporting at least 5,000,000 persons to Germany to serve German industry and agriculture. . . .

" During the first two years of the German occupation of France, Belgium, Holland and Norway, however, an attempt was made to obtain the necessary workers on a voluntary basis. . . .

" Committees were set up to encourage recruiting, and a vigorous propaganda campaign was begun to induce workers to volunteer for service in Germany. The propaganda campaign included, for example the promise that a prisoner of war would be returned for every labourer who volunteered to go to Germany. In some cases it was supplemented by withdrawing the ration cards of labourers who refused to go to Germany or by discharging them from their jobs and denying them unemployment benefit or an opportunity to work elsewhere. It was

on the 21st March, 1942, that the defendant Sauckel was appointed Plenipotentiary-General of the Utilisation of Labour(1) . . . Sauckel's instructions . . . were that foreign labour should be recruited on a voluntary basis, but also provided that ' where, however, in the occupied countries the appeal for volunteers does not suffice, obligatory service and drafting must under all circumstances be resorted to." Rules requiring labour service in Germany were published in all the occupied territories. The number of labourers to be supplied was fixed by Sauckel, and the local authorities were instructed to meet these requirements by conscription if necessary. That conscription was the rule rather than the exception. . . .

" The evidence before the Tribunal establishes the fact that the conscription of labour was accomplished in many cases by drastic and violent methods. . . . Man-hunts took place in the streets, at motion picture houses, even at churches and at night in private houses. Houses were sometimes burnt down, and the families taken as hostages. . . . The treatment of the labourers was governed by Sauckel's instructions on the 20th April, 1942, to the effect that : ' All the men must be fed, sheltered and treated in such a way as to exploit them to the highest possible extent, at the lowest conceivable degree of expenditure ' . . .

" The evidence showed that the workers destined for the Reich were sent under guard to Germany, often packed in trains without adequate heat, food, clothing or sanitary facilities. The evidence further showed that the treatment of the labourers in Germany in many cases was brutal and degrading. . . . Punishments of the worst kind were inflicted on the workers. . . . Concentration camp commanders were ordered to work their prisoners to the limits of their physical power."

It is within the scope of the above scheme and treatment that the Netherlands Special Court examined the evidence of the part taken by Rauter in Holland regarding the Nazi slave labour policy.

It was shown that, in the initial stages, Rauter's orders were limited to certain classes of inhabitants. The first of these orders was to the effect that " raids and man-hunts shall be carried out for those persons belonging to the 1924 draft who are now living illegally in the Netherlands." Such inhabitants were to be sent to a concentration camp at Ommen, and deported for slave labour.

Later orders, disclosed in a letter of the accused addressed to the Commander of the Security Police (Befehlshaber der Sicherheits-und Ordnungspolizei) in Holland and dated 15th July, 1943, extended the round-ups to other categories. These included men liable to military service from the classes 1923 and 1924 ; hidden Jews ; students not in possession of an identity card prescribed by the occupying authorities ; Netherlands police officials who had gone " underground." Rauter's instructions to apprehend the above categories of inhabitants for slave labour were couched in the following terms :

" With a view to upholding state authority with regard to the ' Arbeitseinsatz ' (mobilisation of labour) decrees. . . . I order that

(1) Fritz Sauckel was found guilty and sentenced to death for having directed the slave labour policy.

each police battalion carries out one man-hunt per week, the entire battalion being employed, and that further the police Commander devises methods to carry out such raids in trains as part of the man-hunt."

Soon after this, and due to further extensions of such raids, Rauter formed a special " Arbeitseinsatzpolizei " (Police for mobilisation of labour). The Decree relating to it was dated 14th April, 1944, and contained the following provisions :

" (1) In order that the sending of Netherlands labour power to the Reich for Arbeitseinsatz may also be energetically promoted by police intervention an Arbeitseinsatzpolizei (police) is being formed.

" (2) The Arbeitseinsatzpolizei has to find out the breaker of a labour contract, the person refusing to do his labour service, the man who overstays his leave, and also those Netherlands workers who do not answer their call-up for labour service, and to take them to the Labour Exchanges concerned.

" (3) For this purpose the members of this Arbeitseinsatzpolizei may undertake searches of the actual or supposed places of residence of those refusing to work if there are good grounds for supposing that the person being looked for is in the house concerned.

" (4) The Arbeitseinsatzpolizei comes under the Generalkommissar fuer das Sicherheitswesen und Hoehere S.S.-und Polizeifuehrer beim Reichskommissar fuer die besetzten niederlandschen Gebiete (The General Commissioner for Public Safety (Higher S.S. and Police Leader) on the staff of the Reich Commissioner for the occupied Netherlands territories)."[1]

In a letter dated 24th June, 1944, and sent to Kaltenbrunner,[2] the head of the Reich Security Main Office in Berlin (Reichssicherheitshauptamt—commonly designated as R.S.H.A.), Rauter gave the following account of this special police force :

" Meanwhile the control of labour service (Arbeitseinsatzpolizei) is now 400 men strong. The fellows have received a very good training, are absolutely all right ideologically and have become the terror of the men ' underground.'

" That, naturally, there will be a great resistance to the Arbeitseinsatzpolizei is clear. Without draconic measures and without the Arbeitseinsatzpolizei nothing can, naturally, be done. No Netherlanders nowadays answers the Labour Exchanges' call for volunteers. They must all be fetched. The whole situation on the Western front calls for this."

With the worsening of the German position on the Western front in those days of 1944, Rauter's orders became the more wide in scope. In a letter of 9th August, 1944, addressed to Himmler, Rauter referred to a conference

(1) It will be remembered that the above position was held by Rauter himself.

(2) Kaltenbrunner was tried by the International Military Tribunal at Nuremberg and sentenced to death. The R.S.H.A. was the top co-ordinating office of the Gestapo and other Nazi police branches, placed directly under Himmler.

with Seyss-Inquart, the Reich Commissioner for the Netherlands, and reported the following measures :

> "We had an important sitting at the Reich Commissioner's yesterday regarding the total war effort. It was at last resolved that the 18, 19, 20, 21 and 22 year-old Netherlanders must in principle and without exception be seized for the purposes of the mobilisation of labour, in order to be handed over to the Reich."

Evidence was produced to show that, as a result, at least 400,000 Netherlanders were deported to Germany for slave labour. They were mostly transported through a camp in Amersfoort. Between 7th January and 1st September, 1944, alone, 34 transports left for Germany. An estimated 34,000 deportees never returned from Germany.

(iv) *Deportation of Students*

Special measures were taken by Rauter to apprehend Netherlands students whom the authorities regarded as hostile towards Nazi Germany, and to deport them to Germany for slave labour.

In a telegram to Himmler dated 6th February, 1943, Rauter communicated the following :

> " The following measures are being carried out :
>
> (1) . . . .
>
> (2) Since 8 a.m. a large scale action has been going on by my orders in the Amsterdam, Utrecht, Delft and Wageningen Universities with the object of arresting as many students as possible belonging to the reactionary camp and sending them off to Vught camp ;
>
> (3) Early on Monday at least 5,000 sons of the monied classes, especially those not working in any way, will be suddenly arrested, all police forces being used, in the three provinces named above where the main resistance repeatedly appears, and then taken to Vught camp. . . ."

In reply to this, Himmler answered by cable the same day :

> " Have received your telegram of 6.2.1943. Agree to points 1, 2 and 3. You can hardly proceed sharply or vigorously enough."

The evidence showed that on 5th May, 1943, there were 14,571 students on the rolls of Netherlands Universities, out of whom 2,274 had signed a declaration of loyalty to the German authorities. On 6th February, 1943, about 1,800 students were arrested, and this was followed by further arrests of several thousand students who had not signed the declaration of loyalty.

All those arrested were sent to Germany for slave labour. A number of them died from the treatment endured in labour training camps (Arbeitserziehungslagern).

(v) *Pillage and Confiscation of Property*

Extensive pillage and confiscation of Netherlands public and private property was effected under Rauter's orders. It was shown that this took place as a result of general instructions issued by Hitler and transmitted to

German authorities in Holland by Goering. A Decree dated 14th August, 1943, and signed " Goering " contained the following instructions :

> " In consequence of the enemy's terror attacks on the civil population in Reich territory the Fuehrer has made the following decision :
>
> In future enemy public and private property in the occupied territories is to be ruthlessly drawn upon for the replacement of property such as house furnishings, furniture, domestic utensils, linen, clothing, etc., destroyed by enemy terror attacks. Giving effect to this decision I order that :
>
> (1) the Reich Commissioner for the Occupied Netherlands Territories, the Militaerbefehlshaber (Military Commander in occupied territory) of Belgium and Northern France, and the Militaerbefehlshaber of France are immediately to seize and confiscate house furnishings, furniture, domestic utensils, clothing of all sorts, etc., to the greatest possible extent, leaving behind only what is strictly necessary ;
>
> (2) the seizure and confiscation are to take place as rapidly as possible and in such a way that it is possible at any time to collect the articles and take them off to the Reich territory concerned."

Further specific orders were sent by Goering to the authorities in the Netherlands. They contained the following instructions :

> " I ask you to have this order carried out ruthlessly, especially in the occupied Netherlands Territories. It is unendurable that thousands of German compatriots are imposing the greatest restrictions on themselves and making heavy sacrifices in order to provide these people who, through enemy terror attacks, have lost house furnishings, furniture, domestic articles, upper and underclothing, etc., with at least those household objects most necessary for life, while the population of the occupied enemy territory is not made to feel in any way the effect of the enemy terror attacks on Reich-territory. The attitude of the Dutch population in connection with this is especially striking, in a way unknown in any other occupied territory, in that it shows its malicious joy at the results of the terror attacks on Reich territory in a spiteful and unconcealed fashion."

The evidence showed that the accused took part more particularly in the confiscation of wireless sets. By Decree of 13th May, 1943, Rauter prescribed the following measures :

> " With a view to the maintenance of public order and safety . . . I hereby decree :
>
> " *Article* 1
>
> (I) All wireless sets, accessories and parts, in the occupied Netherlands territories are declared confiscated as from this moment.
>
> " *Article* 2
>
> Unless otherwise determined by the Higher S.S. and Police Leader the confiscated wireless sets, accessories and parts, are to be handed in by the owner to the competent local police authority who will call

in the co-operation of the P.T.T. (post, telephone and telegraph) for this purpose. Place and time of handing in will be made known by the police authority within ten days of the publication of this decree by means of a notification in the daily press or in the way generally used in the locality."

As a result a very large number of wireless sets was confiscated. In a letter to Himmler of 25th July, 1943, the accused gave the following account :

" Up to now, 735,000 radios have been handed in. Large quantities have still to come in in the Amsterdam, Hague and Rotterdam municipalities so that it can be confidently reckoned that 800,000 radios will have been handed in by 15th August.

" In addition to this there are another 100,000 sets which have been released and which may remain with the owners, so that 900,000 apparatus will have been seized. There are still 200,000 sets missing and in order to round these up I have ordered a razzia (raid) to be held once a week by each police battalion who will cordon off country places and groups of houses in towns. . . ."

(vi) *Persecution of Relatives*

Rauter introduced a series of measures which were intended to act as a means of intimidation or revenge, and which affected innocent inhabitants on account of acts committed by other inhabitants. One of these measures consisted in arresting and confining to concentration camps those relatives of members of the Netherlands police forces who had left their duty with a view to avoiding carrying out German orders or for the purpose of taking part in the Netherlands resistance movement.

In a letter to Himmler, dated 10th August, 1943, the accused reported the following :

" I have just decreed that the relatives and parents of ' Marechaussee ' and other police officers who disappear, going ' underground ' and taking their pistols and ammunition with them, are to be arrested. It is only in this way that I can check the process."

The order was transmitted by the General Directorate of Police in the following terms :

" I wish hereby to inform you that the Hoehere S.S. and Polizeifuehrer, S.S. Obergruppenfuehrer und General der Polizei Rauter, has decided the following in principle :

(1) Whenever Netherlands police officers, whether belonging to the State or Municipal police, leave the service of their own accord, either dressed in uniform and having firearms with them or out of uniform and not in the possession of firearms, the Sicherheitspolizei must immediately take the nearest relatives of the police officer concerned into custody. These will be taken to a concentration camp."

Many relatives of such police officers were interned in concentration camps, and numbers of them treated as hostages.

(vii) *Imposition of Collective Penalties*

Another measure of intimidation or revenge consisted in imposing fines on whole communitities for acts committed by unknown individuals.

One of the cases in point took place because, during the night of 27th-28th February, 1942, a German military telephone cable at Alkmaar was cut and destroyed by unknown perpetrators. The following was communicated on behalf of Rauter to the burgomaster (mayor) of Alkmaar :

> " During the night of 27th-28th February, 1942, a German Wehrmacht cable in your municipality was cut through by persons unknown.
>
> " On account of this act of sabotage the General Commissioner for Public Safety has as a measure of repression ordered that the cable in question shall at once be guarded, this to last provisionally for six weeks and has further imposed a fine of 50,000 guilders."

As testified by the burgomaster at the trial, the fine was paid and the guard duty provided as threats of more serious penalties were made by Rauter's police officers.

Two earlier cases took place in the following circumstances :

During the night of the 5th-6th January, 1942, German military telephone cables in the municipality of Zandvoort were cut and damaged. A fine of 20,000 guilders was imposed upon all inhabitants of the community and a watch ordered for a period of four weeks. As in the first instance, the fine was paid and the watch provided.

In May, 1941, a flag parade on one or more German warships was disturbed by someone on the shore who whistled with his fingers imitating a German whistle signal. A fine of 20,000 guilders was imposed upon and paid by the municipality of Maasslais, which was concerned in the case.

(viii) *Measures undertaken in " Reprisals " (Indiscriminate Arrests and Detentions, Killing of Hostages)*

Various measures were undertaken by Rauter as a direct " reprisal " against innocent inhabitants for acts of violence committed against members of the German occupying authorities by unknown persons. These measures took the shape of indiscriminate arrests and detentions and of the killing of hostages. In some instances both measures were undertaken at the same time.

The cases proved before the Court were the following :

On 30th January, 1943, a non-commissioned officer of the German Wehrmacht (army) was shot down in Haarlem. The author was not discovered. In accordance with orders of the Army Commander (Wehrmachtbefehlshaber) in the Netherlands, General F. Christiansen, that 10 hostages should be shot for every German soldier killed, Rauter's men shot 10 Jews from Haarlem and the surroundings, and interned in a concentration camp a large number of inhabitants. The case was reported by Rauter in an announcement published in the Netherlands press on 2nd February, 1943 in the following terms :

> " As a reprisal for one German soldier treacherously murdered . . . 10 hostages coming from Jewish communist circles in Haarlem and its surroundings have been shot to-day. In addition a fairly large number

of communist agitators in the same district have been sent to a concentration camp."

It was established that of the 10 hostages, 7 came from people arrested in Haarlem and neighbouring municipalities, whereas three came from Velsen where they had been arrested on another occasion several weeks before. Over 100 persons were sent to the concentration camp concerned. Both measures were undertaken in consultation between Rauter and General Christiansen.

The second case was described by Rauter himself in a public announcement dated 5th January, 1944. The announcement read as follows :

" The Higher S.S. and Police Leader announces :

During the evening of 3rd January, 1944, a murderous assault was made in Leiden on the head of the Labour Exchange there, Gerardus Willem Diederix. Diederix was badly wounded on the public highway by a pistol shot fired from behind. This is undoubtedly a crime for political motives. As a punitive measure the time when it is no longer permissible to be out of doors in Leiden has till further notice been set back to 9 p.m. and the closing time for public buildings to 8 p.m. In addition some fifty inhabitants of the Leiden municipality have been arrested who, in view of their political sympathies, must be regarded as approving this cowardly assault. Three persons resisted arrest, alternatively, tried to escape, and were shot during the attempt. It is probable that two people who could not be recognised in the darkness were the authors of the assault."

The whole operation was carried out on Rauter's orders and by his men.

The third case took place in the following circumstances :

On the evening of 10th January, 1944, near Kamplust Hotel in Soest, two members of the resistance movement who were transporting police uniforms were arrested by Dutch S.S. men stationed in that place. Both these persons managed to run away in the darkness and escaped. The same night the S.S. made inquiries at several addresses in Soest. Early in the morning of 11th January, 1944, two S.S. men forced three cyclists riding along the Vinkenweg in Soest to stop. A shooting affray took place between the cyclists in question and the S.S. men, one of the S.S. being badly wounded by a shot in the chest. The cyclists managed to escape. As a reprisal a razzia was held in Soest on the evening of 14th January by the S.D. from Amsterdam. Fifty persons were arrested and five were shot as hostages. The case was reported by Rauter to Himmler on 11th January, 1944, with particulars concerning yet another case of the same kind :

" A few days ago a Police Oberleutnant [Captain], a member of the Germanic-S.S., was shot down from his bicycle. The same day I had 50 of the principal inciters in Groningen and district arrested. During this 5 of these inciters were shot when resisting and trying to escape. This measure has had a marvellous effect. Next day an N.S.B. Arbeitsamtleiter (head of the Labour Exchange) in Leiden was shot from behind in the street in the dark. An operation was performed and the bullet removed from a kidney ; there is no longer danger for his life. In this case also I had 50 inciters arrested of whom 3 were shot while trying to escape."

The fourth case took place on 16th April, 1944, in Baverwijk and Velsen. Attempts were made on the lives of two members of the Netherlands quisling police. Both localities were surrounded and cordoned off by Rauter's police. Machine-guns were erected at various places and all houses were searched. 480 men between the ages of 18 and 25 were seized and interned in the concentration camp at Amersfoort. 300 were later sent to Germany.

The part taken by Rauter in this and similar cases was illustrated by a written communication of his to the burgomaster of Beverwijk of 30th June, 1943 :

> " The arrest of 480 young men of the ages of 18 to 25 is a reprisal action with regard to Beverwijk municipality, the intention being to prevent further attempts from being started. . . . For that reason it had to reach as wide a circle of persons as possible, a great number of whom I am quite convinced are innocent. The 400 who remain and who are in Amersfoort camp are going to Germany and will there be set to do enclosed work under decent conditions for the Arbeitseinsatz.
>
> " I have to stick to these measures because it must be made quite clear to all Dutch municipalities that in similar cases I shall answer in the same way, and it is only in this fashion and by such measures that I can frighten the circle of those who act thus and who, at least outwardly, assert that they are acting in the national interests."

Rauter's initiative in carrying out the above measures, within the general Nazi policy of taking acts of revenge against the civilian population of occupied countries, was shown in the case of his differences with the chief of staff of the Army Commander, General Wuehlisch. In a long report to Himmler of 13th January, 1944, he complained of Wuehlisch's opposition to having hostages put to death without prior investigation being made as to the identity of the perpetrators. Wuehlisch also made attempts to remove cases involving members of the Wehrmacht from Rauter's hands. The accused's report contained the following passages :

> " These last two days I have twice talked at length with the Wehrmachtsbefehlhaber Chief of Staff, Generalleutnant Wuehlisch, about the atonement to be made for the attack on the Wehrmacht man in Almelo. Von Wuehlisch won't go along with me . . . and demands that a closer connection with the perpetrator must at all events be produced. To this I answered that the official police inquiry had been wound up and that, further, there was no prospect of catching the author through the police. I suggested having shot 10 out of the 50 inciters whom I had had arrested the same night in Almelo and district, as I was afraid that if nothing happened the number of attacks on members of the Wehrmacht would rise. I pointed to the Amersfoort case. To this Von Wuehlisch answered that this happened to be a Dutchman. He is as sticky as dough and just won't collaborate!
>
> " He then asserted that satisfaction for the S.S. man was a matter for the Wehrmacht and not for the Higher S.S. and Police Leader, as the Waffen-S.S. belonged to the Wehrmacht. I countered this by saying that the Waffen-S.S. are special disposal troops which, via the Reichsfuehrer S.S., come directly under the Fuehrer and that only the active divisions are attached to the Army and with it the Wehrmacht."

Rauter received the following reply by telegram from Himmler :

" Letter 13th received. No need to worry about the Chief of Staff. I order you to carry out reprisal and anti-terrorist measures in the sharpest way. To neglect such measures would be the only official crime which you could commit in these cases. Complaints only do you honour."

After this Rauter felt authorised to act without restrictions so that cases of putting to death of hostages increased in number. The following three public announcements made by the accused were recorded :

" The Hoehere S.S. und Polizeifuehrer Nordwest announces :

As a result of the cowardly attempt for political reasons on the life of the Attorney General, Dr. J. Feitsma, the following persons were summarily shot on 7th February, 1945, as a retaliatory measure :

(1) J. Smuling, Freemason and member of the Supreme Court,

(2) Dr. W. J. H. Dons, vice-president of the District Court in this place,

(3) Dr. J. H. Hulsmann, Judge of the Criminal Court in this place,

(4) J. Bak, communist leader and leader of a resistance organisation,

(5) C. W. Ittmann, communist medical practitioner ; all of Amsterdam."

The second announcement read :

" The Higher S.S. and Police Leader and General Commissioner for Public Safety announces :

" On account of the cowardly political murder in Rotterdam on 15.7.44 of Mr. van Daalen, departmental head of the Municipal Registration Office, a number of terrorists and saboteurs already in custody were summarily shot on 17.7.44."

The third announcement read :

" During the evening of 27.11.44 armed terrorists attacked the farmer J. Huisman on his farm and shot down the latter's son Henry, accusing him of supporting the German Wehrmacht. H. Huisman was severely wounded. As a result of this a number of arrested terrorists and saboteurs were summarily executed on the evening of 28.11.44 ; these were : [there follow 10 names.]"

The accused made partial admission of guilt. He acknowledged that " sometimes " innocent persons were shot by his orders as a " reprisal " for murders or murderous assaults on members of the German occupying authorities, and that this took place in the cases at Haarlem and Soest reported above. He admitted that decisions were made every time by him, the Reich Commissioner, Seyss-Inquart, and the Army Commander, General Christiansen, shortly after the murder or assault. He also admitted that the expression used in public announcements and other documents " shot while attempting to escape " often meant that the vicitim was deliberately shot without an attempt to escape being made.

Further admissions of the accused disclosed that in July, 1944, Hitler had suspended the jurisdiction of occupation courts in criminal cases, and that

the German security police was entrusted with imposing punishments without trial. A number of inhabitants were always kept in custody as " Todeskandidaten " (death candidates). These were publicly executed in retaliation for offences committed against the occupying authorities.

In 1943 the killing of innocent inhabitants in " reprisals " took the shape of a systematically organised action, and was given the code name of " Operation Silbertanne " (Silver Fir). This " operation " was decided upon and devised by the accused at a conference held with the head of the so-called Germanic (Netherlands) S.S., Feldmeyer. Testimonies given by former members of the German Security Police and other police branches under Rauter in the Netherlands provided details. The following account was given by Goerg Haas, former Sipo (Sicherheitspolizei) and S.D. (Sicherungsdienst) head of the local police station (Aussendienstelleleiter) at Groningen :

> " The actions were to be carried out by the S.D. in close co-operation with the Germanic S.S. Orders would be given by B.d.S.(1). The main idea was that everywhere where assaults on members of the N.S.B.(2) or other National-Socialists took place there should be a counter-action. This was intended purely as a reprisal. Everything concerned with the matter must of course be kept strictly secret. For that reason the name ' Silbertanne ' was given to everything connected with this business, this name being used particularly in telephone conversations.
>
> " The following directives were also given :
>
> " If an act of terrorism had taken place anywhere the leader of the S.D. Aussendienststelle concerned, this for the North was me, would report this to the B.d.S. The answer from the B.d.S. would come back by telephone or teleprinter. This would be ' Silbertanne ' with a number, this meaning the number of people who were to be shot. . . . In the course of time I reported several cases of local terrorism to the B.d.S. I then received an answer the above way.
>
> " The rule was that for one person shot dead by terrorists three were to be disposed of by ' Silbertanne ' . . . The names of the persons to be shot were not mentioned by the B.d.S. The leader of the Aussendienststelle concerned had to see to this himself. . . . One further thing I can say in this connection is that Feldmeyer(3) was with me once and spoke to me about ' Silbertanne.' He said then that the General Commissioner for Public Order and Safety had given orders that ' Silbertanne ' should automatically operate after each act of terrorism, that is already before the order from the B.d.S. to this effect would come. I said to Feldmeyer however that I was only going to proceed to measures of that sort if the order were given by the B.d.S."

Witness E. Naumann, who held the rank of General of the Police and was " Befehlshaber der Sicherheitspolizei (Sipo) und des Sicherungsdienstes (S.D.)," testified that it was Rauter who gave the orders for the carrying

(1) Befehlshaber der Sicherheitspolizei (Commander of the Security Police) placed under Rauter.

(2) Quisling National-Socialist Movement in the Netherlands.

(3) Head of the Netherlands SS.

out of operation " Silbertanne," and confirmed that the latter was put into effect by the Sipo and S.D. and the Netherlands S.S.

The accused admitted the above facts and acknowledged the killing of 45 Dutchmen as a result of operation " Silbertanne."

3. *The Defence*

The accused introduced pleas on several questions of law, as well as on some questions of fact.

He challenged the jurisdiction of the Court on two grounds. First, he claimed a trial by an international court, submitting that, according to certain provisions of the Netherlands Law, the jurisdiction of Dutch courts were limited by exceptions recognised in international law. Such an exception would appear in his case as he could be held answerable only on the basis of the laws and customs of war, which fell within the scope of international jurisdiction. Alternatively, the accused invoked the right to be tried as a prisoner of war, under the rules of the Geneva Convention relative to the Treatment of Prisoners of War, of 1929. This inferred the jurisdiction of a military tribunal competent to try officers of the accused's rank, that is the Netherlands Supreme Military Court.

Pleas were also made in regard to certain principles of substantive law.

One of the pleas concerned the general principle of penal law that no act is punishable unless provided against by express rules preceding its commission (*Nullum crimen, nulla poena sine lege*). The accused's contention was that acts with which he was charged were made punishable in the Netherlands by means of *ex post facto* legislation enacted on 10th July, 1947,[1] so that they were not punishable prior to that date.

Another plea concerned the instruments of surrender of 15th May, 1940, by which the Netherlands forces had capitulated to the German invaders. It was contended that these instruments had imposed upon the Dutch population the duty to refrain from committing acts of violence and thereby resisting the occupying authorities. It was also contended that for the same reason a similar obligation lay upon the Netherlands Government in exile, who had no right to organise such a resistance and incite the Dutch population to take part in it, as, in effect, it did. By acting in this manner, both the Netherlands Government and the Dutch population had violated the laws and customs of war and had thereby relieved the accused of the obligation to abide by such laws and rules, and consequently authorised him to take reprisals.

On questions of fact the following circumstances were submitted :

Regarding the deportation of Jews to the East, the accused had no knowledge of the fact awaiting them at their destination, namely of the fact that they would be ill-treated or exterminated.

The deportation of Dutch students to Germany was done out of military necessity, as these students belonged to classes liable to be called up by the Dutch resistance movement and a landing of the Allies in the Netherlands was feared at the time.

As regards the total range of the offences charged, responsibility was denied on the grounds that authority to make decisions for their commission did

[1] See pp. 112-113 below.

not belong to the accused, but to other persons or agencies. The plea of superior orders was invoked in this connection.

4. *Findings and Sentence*

The accused's pleas were dismissed for reasons recorded in the Notes of this Report. He was found guilty on all the seven counts of the indictment, as recorded in the beginning of this Report, that is of acts containing, in the opinion of the Court and according to Netherlands law, the elements of kidnapping, extortion, larceny, illegal deprivation of liberty resulting in some cases in death, homicide and murder, and constituting under the rules of international law, ill-treatment, deportation for slave labour, murder and plunder of private property.

The Court passed a sentence of death.

III. PROCEEDINGS OF THE SPECIAL COURT OF CASSATION

1. *The Accused's Appeal*

Appeal against the Judgment of the Special Court at the Hague was made only by the accused. It was submitted to the Special Court of Cassation, within the terms of its appellate jurisdiction over trials of war criminals.[1]

The accused challenged the first Court's judgment on different legal grounds simultaneously, which included some of the pleas previously submitted to the first court.

(i) *Jurisdiction of Netherlands Courts*

The plea that Netherlands Courts, both of first instance and appellate, lacked jurisdiction to try the accused was repeated on the same grounds as was done before the first Court. Art. 13 (A) of the Netherlands General Provisions Law was invoked, according to which :

> " The competency of the judge and the feasibility of legal judgments and of authentic instruments are limited by the exceptions recognised in international law."

A similar rule is contained in Art. 8 of the Netherlands Penal Code, which was also referred to by the accused.

It was submitted that such an exception was present in the case tried, on the grounds that jurisdiction over violations of the laws and customs of war belonged to international and not municipal courts of law. It was further submitted that even if this were not the case, the accused was entitled to be tried under the terms of Arts. 45, 46 and 63 of the Geneva Convention relative to the Treatment of Prisoners of War. This, in view of his rank, would give the accused the right to be tried by the Netherlands Supreme Military Court, and not by the two Special Courts which became involved in the case.

(ii) *Right to Reprisals*

The plea was also repeated that the accused was relieved of the obligation of abiding by the laws and customs of war, and was, as a consequence,

[1] See pp. 111-112 below.

entitled to take reprisals. The following two arguments were re-stated in the following terms :

(*a*) The Netherlands Government in exile, both by means of the wireless and by sending weapons, had from London systematically incited the Dutch population to resistance against the German occupying authorities, and the population had answered these incitements both individually and as a whole, in violation of the terms of capitulation of 15th May, 1940 ;

(*b*) The population of the occupied territory, in violation of the laws and customs of war, had refused to bear quietly the burden of the occupation and in every possible manner had rebelled against the German authorities.

For these reasons the German Reich, and the accused as its executive organ, were entitled to commit the acts charged.

(iii) *Wrongful application of rules of substantive and procedural law*

The accused appealed against the findings concerning the legal nature of the offences described in the first charge, *i.e.*, the treatment of the Jews. On this count the first Court had found the accused guilty of acts containing, according to Netherlands law, the elements of " kidnapping and homicide." The first offence (kidnapping) covered cases of deportations, outside Holland, whereas the second offence (homicide) was meant to cover cases in which Jews were killed in consequence of deportations. The accused's appeal was that he had been prosecuted for " the arrest of the Jews as part of their deportation," and not for the deportations themselves. His claim, in this connection, was that from the Court's findings on points of fact it could not be deduced which facts were taken by the Court as proving his guilt of " kidnapping[1] and homicide."

The accused raised also a number of objections with reference to Netherlands rules of procedure affecting the form and contents of indictments and judgments. He complained that both the writ containing the charges and the judgment of the first Court contained inadequate and insufficient statements regarding the facts. In the judgment this made it impossible to ascertain which acts or facts were declared proved and which were not, and in particular whether he had been found guilty of having committed the alleged offence in person or only through his subordinates.

(iv) *Wrongful imposition of Penalty*

Finally, the accused appealed against the death penalty. He invoked provisions of Netherlands penal law according to which the sentence should correspond to the nature and gravity of the crime, and the circumstances attached to the person of the perpetrator and the facts of the crime. The accused's contention was that, in view of the circumstances, the sentence was utterly disproportionate and that the first Court had neglected to consider his pleas affecting the issue of the penalty. These were the pleas

[1] " Kidnapping " is provided against by Art. 278 of the Netherlands Penal Code, which runs as follows : " He who conveys someone over the borders of the Realm in Europe with the intent to place him illegally in the power of another, or to place him in a helpless situation, shall be guilty of kidnapping and shall be punished with imprisonment not exceeding 12 years."

that he had acted in self-defence and out of necessity, and also pursuant to " statutory provisions, " that is to rules in force in the Netherlands during the occupation.(1)

2. *Findings and Sentence*

The Special Court of Cassation passed judgment, quashing and revising the judgment of the first Court in regard to findings concerning the legal nature of the offences of which the accused was found guilty, and confirming it in every other respect, with only one exception of substance.

The revisions were of a technical nature and were made with a view to making the findings correspond more adequately to the definitions governing the punishment of war criminals in Netherlands law. So, for instance, adjustments were made as to the elements of acts punishable under Netherlands law and constituting war crimes and crimes against humanity as punishable under rules of international law.(2) An additional statement was made which specified which of the acts punishable under Netherlands law constituted war crimes, and which crimes against humanity.

All the pleas of the defendant were rejected and the accused's guilt and death penalty were confirmed. The reasons concerning the rejection of the most important pleas will be found later in the Notes on the Case. Only one revision was made regarding acts of which the accused was found guilty. The accused was not found personally responsible for the death of the persons deported by him, but only of deportations and acts incidental to them, such as illegal arrests and detentions.

The findings of the Special Court of Cassation relating to the imposition of penalty and the severity of the punishment actually imposed, deserve attention. They read as follows :

> " When trying war crimes and other crimes treated on the same footing and committed by persons of enemy nationality, the task of the Netherlands judicature is not confined to the punishment of infringements of Netherlands justice, but has rather the object of giving expression to the sense of justice of the community of Nations, which sense has been most deeply shocked by such crimes.
>
> " The Nations united in the war against the Axis Powers have repeatedly declared the necessity of trying war criminals and their intentions to this effect found their embodiment in the Declaration of Moscow of 30th October, 1943, with reference to German cruelties in

(1) The relevant Netherlands provisions for necessity and self-defence are the following : Art. 40 of the Penal Code : " He is not punishable who commits an act to which he was urged by absolute necessity." Art. 41 of the Penal Code : " He is not punishable who commits an act impelled by the necessary defence of his own or another's body, chastity or property against immediate, unlawful assault. The transgression of the limits of necessary defence is not punishable if it was the immediate result of a violent emotion caused by the assault." The plea concerning " statutory provisions " is covered by the Penal Code and the Military Penal Code. Art. 42 of the Penal Code reads : " He is not punishable who commits an act in carrying out a statutory provision." Art. 38 of the Military Penal Code provides : " He is not punishable who in time of war and within the limits of his competency, commits an act allowed by provisions of the Rules of War, or whose punishment would conflict with a pact in force between the Netherlands and the Power with which the Netherlands is at war, or with a provision prescribed as a result of such pact."

(2) See comments on Art. 27 (A) of the Netherlands Extraordinary Penal Law Decree of 22nd December, 1943, pp. 112-113 below.

occupied Europe, according to which Declaration the German officers and men and members of the Nazi party who were responsible for, or by giving their permission participated in, cruelties or crimes, should be sent back to the countries where their horrible deeds were carried out in order that they could be tried and punished in accordance with the laws of those liberated countries and of the free Governments which were to be established there.

" This Realm associated itself with the said Declaration, accepted the competency and obligation in international law arising from it, and enacted the necessary statutory provisions in the matter.

" The international elements which . . . characterise the nature of the intervention of the Supreme Netherlands Authority [Parliament] in the punishment of war criminals, must also determine the judgment which this Court, administering the law in the name of that authority, is called to deliver.

" With particular regard to the imposition of the punishment, the above considerations must be allowed to be felt in the sense that the gravity of the acts committed and the proportionate punishment of them must be decided according to an objective standard. . . .

" This Court, taking all this as true, can come to no other conclusion than that of the Special Court and is of the opinion that on correct grounds, with which this Court associates itself, the first court imposed the gravest penalty on appellant.

" Indeed the acts charged against appellant and declared proved . . . betray such a reprehensible mentality, bereft indeed of every conception of right or morality, and to such an extent did they bring with them serious results for innumerable victims of the reign of terror exercised by appellant, that the latter can alone pay with his life for his conduct.

" This Court will also accept that appellant allowed himself to be guided by his zeal for the promotion of the interests of his country and the furthering of a German victory, using all the resources at his command to this end.

" However, this provides no grounds for excuse or reasons for mitigation of punishment for the appellant, as feelings of patriotism can never signify a licence to conduct a war with criminal means, condemned indeed by international law, nor to apply inhumane measures of terrorism to the populations of occupied territories.

" Together with the Special Court, this Court considers as exceptionally serious the appellant's actions against the Jewish portion of the Netherlands nation, and also the measures with regard to the ' Arbeitseinsatz ' including under this term the deportation of students —this in connection with the unspeakable misery which was brought as a result to countless victims and their families, and in particular considers with extreme gravity the appellant's share in the killing of innocent persons.

" The appellant may be presumed to possess sufficient discrimination so as to have been clearly aware that such cowardly and furtively committed acts can never fall within the limits set to the exercise of an occupant's powers.

" During the hearing of his case the appellant, while asserting his innocence, has stated that he recognised the right of the Netherlands nation to retaliation, and that to this end he placed himself at the disposal of the Netherlands Government.

" Such a statement must be denied any practical significance for the very reason that it was made with the assumption that the Netherlands Government would be competent and prepared to victimise an innocent person for the suffering caused to its subjects during the war, a train of thought which is not in accordance with the conviction of what is right in this land, nor with the moral conceptions of the Netherlands nation.

" By the said statement, however, the appellant has given evidence that he also has a lively understanding of the frightful results of the German administration during the occupation, so that this Court, now that the appellant has been found guilty on account of his important share in that administration's misdeeds . . . finds in the said statements a confirmation of its opinion that no lighter punishment than that imposed by the Special Court could suffice."

B. NOTES ON THE CASE

1. THE COURTS

The Special Court in the Hague was one of five courts in the first instance which were instituted in Holland for the trial of, among other offenders, war criminals, under the terms of two decrees of 22nd December, 1943 (Statute Book of the Kingdom of Netherlands No. D.62 and D.63), and of a third decree of 12th June, 1945 (Statute Book No. F.91) as amended by a decree of 27th June, 1947 (Statute Book No. H.206). The Court was composed of three judges, one of whom was a military judge, as required by the above decrees. The proceedings were held under the rules contained in the said decrees, and substantive law applied as prescribed in the Extraordinary Penal Law Decree of 22nd December, 1943 (Statute Book No. D.61), as amended on 10th July, 1947.

The Special Court of Cassation was likewise instituted by the above decrees as a special court of appeal in trials held for offences provided against by the Extraordinary Penal Law Decree No. D.61 of 1943, which includes the trial of war criminals under the terms of a law of 10th July, 1947. This law amended the Extraordinary Penal Law Decree D.61 by adding to it a new Article 27 (A), which made express provision for the trial of persons guilty of war crimes or crimes against humanity, as defined in the Charter of the International Military Tribunal at Nuremberg of 8th August, 1945. The amendment contained also precise directives as to how the penalties were to be imposed under the rule and provisions of Netherlands municipal law.

The judgment of the Special Court of Cassation was pronounced in accordance with a provision prescribing that, where appeal is made for " wrongful application or violation of the law," that is for faulty application of rules of substantive law,(1) the Special Court of Cassation passes its own

(1) In Netherlands law wrongful application of the rules of procedure constitutes a separate category of appelate cases. Wrongful application of rules of substantive law comprises the imposition of inadequate penalties.

judgment, instead of quashing the judgment of the first court and directing a new trial.(1)

2. THE JURISDICTION OF NETHERLANDS COURTS OVER WAR CRIMES

Both the Special Court at the Hague and the Special Court of Cassation rejected the pleas with which the accused had challenged their jurisdiction, and gave detailed reasons for their concurring decisions. In doing so they examined, among other questions, the relevance of the Geneva Convention relative to the Treatment of Prisoners of War, 1929, as invoked by the accused. They based their findings on general principles of international law in their relationship to Netherlands municipal law, and on specific rules of the latter which regulate their competence in the field of war crime trials. The views expressed with regard to international law are illustrative of principles generally accepted by the community of nations, and according to which implementation of the laws and customs of war falls within the purview of municipal jurisdiction in the same manner as that of many other rules of international law. The opinion of the Special Court of Cassation in respect of the applicability of the Prisoners of War Convention, 1929, may be regarded as one of the best authoritative pronouncements on the subject.

(i) *Jurisdiction under Art.* 27 (A) *of Extraordinary Penal Law Decree*

Competence over trials of war criminals was conferred upon Netherlands courts of law by Art. 27 (A) of the Extraordinary Penal Law Decree No. D.61 of 22nd December, 1943. Art. 27 (A) was introduced by a law of 10th July, 1947, as a result of developments on the subject of war crime trials by Dutch courts which are recorded elsewhere.(2) This Article, besides placing war crimes within the purview of the Netherlands national courts' jurisdiction, lays down the rules of substantive law under which war criminals are liable to punishment by Dutch Courts. It reads as follows :

> " 1. He who during the time of the present war(3) and while in the forces or service of the enemy State is guilty of a war crime or any crime against humanity as defined in Art. 6 under (*b*) or (*c*) of the Charter belonging to the London Agreement of 8th August, 1945, promulgated in Our Decree of 4th January, 1946 (Statute Book No. G.5) shall, if such crime contains at the same time the elements of an act punishable according to Netherlands law, receive the punishment laid down for such act.
>
> " 2. If such crime does not at the same time contain the elements of an act punishable according to the Netherlands law, the perpetrator shall receive the punishment laid down by Netherlands law for the act with which it shows the greatest similarity.
>
> " 3. Any superior who deliberately permits a subordinate to be guilty of such a crime shall be punished with a similar punishment as laid down in paragraphs 1 and 2 (above)."

(1) An account of the jurisdiction of Netherlands Courts in war crime trials, as well as of the Extraordinary Penal Law Decree No. D.61 of 22nd December, 1943, as amended on 10th July, 1947, will be found in the *Annex* to Volume XI of this series.

(2) See *Annex* to Volume XI of this series, pp. 89-91.

(3) *i.e.*, the Second World War, 1939-1945.

It will be noticed that, by making punishable war crimes and crimes against humanity as defined in the Nuremberg Charter, the above provision placed the laws and customs of war, as contained or evidenced in the Charter, within the direct competence of Netherlands Courts. Reference to this effect of Art. 27 (A) was made by both Courts in the trial under review, in addition to other considerations.

(ii) *Findings of the Courts*

It will be remembered that the accused had invoked Art. 13 (A) of the Netherlands General Provisions Law and Art. 8 of the Netherlands Penal Code, according to which the jurisdiction of Netherlands Courts is limited by " exceptions recognised in international law."

The Court in the first instance rejected the plea on the following grounds :([1])

> " The greatest diversity of opinion reigns among writers on international law with regard to the question as to whether soldiers in enemy territory are subject to the penal laws prevailing there, so that there can be no mention of an exception recognised by international law.
>
> " The Netherlands legislator has deemed it necessary to enact provisions by the Law of 10th July, 1947([2]) in order to remove doubts as to the possibility of putting on trial those who, while serving with or under the enemy, have been guilty of war crimes or crimes against humanity. The judiciary in the Netherlands is not allowed to test the law for its intrinsic value and is also under the obligation to apply it without comment, but furthermore there is no need to put the legitimacy of the said law in doubt as there is no rule of international law forbidding a belligerent State, either during or after hostilities, to punish war criminals who are in its power.
>
> " It might perhaps be commendable that an international court should exist which could be charged with the trial of war criminals, but such international justice has not yet advanced so far. It is for this reason that, after the first World War, the victors laid the duty of trying their criminals on the vanquished themselves, but nothing much came out of this.([3]) In these circumstances law and justice are better served now that the victors have themselves taken in hand the trial of the serious crimes committed by the Germans during the present war than if these crimes were to be left unpunished.([4]) Moreover, the guarantees offered by Netherlands law to every accused person in order that he may be in a position to defend himself, remain fully unaffected."

([1]) For the sake of easier reading, the texts quoted from the Judgment of the First Court and the Court of Cassation have been reproduced by deleting the words " Considering that " with which every new sentence or paragraph of the reasons given by Netherlands Courts is commenced.

([2]) The law which introduced Art. 27 (A) of the Extraordinary Penal Law Decree No. D.61 previously quoted.

([3]) This is a reference to the trials held in 1920 by the German Supreme Court in Leipzig against war criminals originally wanted by Allied courts under the terms of the Treaty of Versailles. It is generally agreed that in these trials serious offenders escaped either with acquittals or minor punishments.

([4]) On the issue of the legal basis of the jurisdiction of the Courts of the victor over war criminals of the vanquished Power, see H. Lauterpacht, *The Law of Nations and the Punishment of War Crimes*, British Year Book of International Law, 1944, pp. 60-63.

The Special Court of Cassation concurred with the above views and gave the following additional reasons :

> " Since the first World War the development of international law has consistently moved in the direction of personal penal responsibility of perpetrators of war crimes and of their being tried either by an International Court of Law or by the courts of the injured belligerent State, this on the basis of the experience that many a belligerent State, and especially Germany, proved to be insufficiently inclined to live up to its international obligations towards its opponent with regard to the punishment of members of its own forces who had violated the rules of war to the prejudice of the opponent.
>
> " Under these circumstances, the Kingdom of the Netherlands has, internationally, legal competence over enemy war criminals, as has also been assumed in the Declaration of Moscow of 30th October, 1943, attention also being directed to the Preamble of the London Agreement of 8th August, 1945, with its appended Charter.
>
> " With the enactment of the Law of 10th July, 1947 (Statute Book No. H.233) no doubt can longer exist of the legal competency of the Netherlands judge to exercise this international jurisdiction of the Realm over enemy war criminals within the scope of the Netherlands justice, nor of the legal basis on which the exercise of this jurisdiction takes place."

The Moscow Declaration, which was signed on 30th October, 1943, by Great Britain, the U.S.A. and the U.S.S.R. and to which reference was made above, provided that, without prejudice to major war criminals who were to be given international trials, other war criminals were to be " sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of those liberated countries." This principle was repeated in the Preamble to the London Agreement of 8th August, 1945, which provided for the trial of the " Major War Criminals of the European Axis." It was confirmed in Art. 6 of the said Agreement which said that " nothing in this Agreement shall prejudice the jurisdiction or the powers of any national or occupation court established or to be established in any allied territory or in Germany for the trial of war criminals."

3. THE PRISONERS OF WAR CONVENTION, 1929, AND THE TRIAL OF WAR CRIMINALS

The accused's plea that he was entitled to be tried as a prisoner of war under the rules of the Geneva Convention, was rejected by the first Court for the following reasons :

> " The Geneva Convention . . . provides in Art. 63 that a sentence on a prisoner of war can only be pronounced by the same courts and in accordance with the same procedure as with regard to persons belonging to the forces of the detaining Power. . . . This does not, as Counsel has argued, carry with it that the accused ought to have been tried by the [Netherlands] Supreme Military Court, as in accordance with the decree on the Special Court . . . the dealing with offences committed in territory occupied by the enemy does not belong to the competence

of military courts but to that of the Special Court in the composition of which the military element is represented.

"The accused's further appeal to Art. 46, para. 1, of the said Convention which provides that no punishments may be imposed other than those prescribed for the same acts with regard to soldiers belonging to the National [Netherlands] armies, and to Art. 8 of the Rules of Landwarfare, fails because Art. 27 (A) of the Extraordinary Penal Law Decree, with the violation of which the accused is charged, equally applies to all who, while in the forces or service of the enemy, have been guilty of any war crime or crime against humanity, so that this Article also applies to a Netherlands soldier who would have violated it."

The Court took also into consideration the accused's appeal to Art. 62 of the Geneva Convention, with reference to which he claimed that he had not had the benefit of a Counsel of his own choice. The first Court rejected this plea on the grounds that it was the accused himself who, on 18th January, 1947, requested the Court to assign him a counsel, that he had had this Counsel's assistance at the trial, and that at no time of the trial had he objected to the Counsel assigned.

In this manner the first Court's reasons for rejecting the plea concerning the jurisdiction of the Court envisaged by the Geneva Convention, were based on two main arguments. First, that offences committed in Netherlands territory during the occupation did not come within the competence of Netherlands military courts, but belonged to that of Special Courts, so that the accused could not be tried by the Netherlands Supreme Military Court as could otherwise be the case according to the Geneva Convention. Secondly, that punishment for offences covered by Art. 27 (A) of the Netherlands Extraordinary Penal Law Decree, with which the accused was charged, was equally applicable to Netherlands soldiers who were in the enemy forces or service, so that the accused had the benefit of the same jurisdiction as that existing for Netherlands military personnel, in accordance with the principle lying at the root of Art. 63 of the Geneva Convention.

The Special Court of Cassation, while concurring with the decision of the first Court as to the rejection of the plea, gave other reasons which, as has previously been stressed, may be regarded as one of the best authoritative pronouncements on the subject. The Court drew a clear line between the offences justiciable under the terms of the Geneva Convention and entailing the implementation of its relevant Articles (45, 46 and 63), on the one hand, and the violations of laws and customs of war entailing war crimes jurisdiction, on the other hand. After having referred to the texts of Arts. 45, para. 1, 46, para. 1, and 63 of the Geneva Convention,[1] the Court stated the following :

"It can already be deduced from the place of the . . . Articles within the general body of that Convention, that . . . Art. 63, as one of the provisions relating to the penal prosecution of prisoners of war,

[1] Art. 45, para. 1, reads : "Prisoners of War shall be subject to the laws, regulations, and orders in force in the armed forces of the detaining Power." Art. 46, para. 1, reads : "Prisoners of War shall not be subjected by the military authorities or the tribunals of the detaining Power to penalties other than those which are prescribed for similar acts by members of the national forces." Art. 63 reads : "A sentence shall only be pronounced on a prisoner of war by the same tribunals and in accordance with the same procedure as in the case of persons belonging to the armed forces of the detaining Power."

aims at cases where the latter have committed offences against the authorities of the State in whose power they find themselves in a more serious manner than by a single breach of discipline, this in violation of the rules referred to in . . . Art. 45 and valid for that State's own armed forces, or [at cases] where prisoners of war had committed during their captivity any other crime for which a penal prosecution comes into consideration."

In support of this view the Court made detailed references to rules which had preceded, in draft or final form, the provisions of the Geneva Convention :

" This limited explanation of the aforesaid Article 63, which excludes the latter being applied to war crimes committed by enemy military personnel *before*(1) becoming prisoners of war, finds confirmation in the history of this subject and especially in the history of its origin, as well as in the later application of the 1929 Convention with the complete agreement of the Red Cross Conferences themselves.

" Indeed Articles 31 and 32 of the Russian proposal to the Brussels Conference of 1874, from which arose Article 28 of the Draft International Declaration relative to the Laws and Customs of War(2) drawn up by that Conference, were exclusively aimed at offences by prisoners of war ' committed during their captivity,' and at conspiracies on their part made ' with a view to [commit] a general escape ' or ' against the authorities located in the place of their internment,' and were in no way aimed at deciding anything about war crimes committed by the parties concerned before their captivity as prisoners of war, a category of crimes by the commission of which, according to old established conceptions, such military personnel had already lost the protection to which they have a right in virtue of the prisoners of war law.

" No other opinion was expressed when, during the First Hague Peace Conference, the said Art. 28 was consolidated with Art. 23 of the Draft Declaration of 1874 and became Art. 8 of the Rules of Land Warfare of 1899, which in its turn was incorporated unaltered in the Rules of Land Warfare of 1907.

" This same train of thought was resumed when in 1921 the first Draft was made of the present Prisoners of War Convention, in which appeared Art. 5, reading as follows :

" The prisoner shall have the benefit of the common law of the detaining State, but he must at the same time, abide by its rules ; for all offences committed he shall be subjected to the civil and military laws in force in the country where he is interned. . . .

" This same limitation finds again expression in Art. 49 of the ' Preliminary Draft ' of 1929, the first paragraph of which provided that ' belligerents shall ensure that the competent authorities exercise the greatest leniency in considering the question whether an offence committed by a prisoner of war should be punished by disciplinary or by

(1) Italics are inserted.

(2) References to documents, rules and opinions quoted by the Court were made in French, from texts written in the same language. These are translated in English from the texts quoted for the sake of the reader, and do not bear any official character.

judicial measures,'—a provision from which arose Art. 52 now in force."(1)

Finally, the Special Court of Cassation made reference to the views expressed by the Red Cross International Committee in connection with the Conference of Experts held in Geneva in April, 1947, on the subject of the laws and customs of war. The Court referred to the " Preliminary Documentation supplied by the Red Cross International Committee "(2) and distributed to the Experts, where the following statement was made (p. 146) :

" *Offences committed before capture*

The text of Art. 45 and the discussions which took place about it at the diplomatic conference of 1929 show that the authors of the Convention envisaged only the offences committed during the period of captivity. The Convention contains no provision concerning offences committed prior to captivity."

The Court also referred to the opinion expressed by the Conference of Experts itself, and quoted the following passage from the Report of the Conference :

" So far as war crimes are concerned it was submitted that in accordance with a principle of customary international law, the origin of which goes far back in history, a soldier captured and found guilty of a war crime could no longer enjoy the benefit of the protection ensured by the Convention. He who, while in battle, violates the elementary rules of the laws of war could not invoke the benefit of the Convention for his protection once he has been made prisoner. Most delegations seem to have agreed to this viewpoint."

The Special Court of Cassation reached the following conclusion and decision :

" Under these circumstances the principle of the London Agreement of 8th August, 1945, with its appended Charter and the practice of surrendering for trial to the Governments of those countries where they committed their crimes soldiers accused of war crimes who had been made prisoners of war, this in agreement with the Declaration of Moscow of 30th October, 1943, is in no way contrary to the Prisoners of War Convention of 1929.

" Both the International Military Tribunal at Nuremberg and the various Allied Military and other Courts without exception recognise this same point of view.

" Therefore the position taken by the appellant that under the terms of Art. 63 of the Prisoners of War Convention of 1929 he should be tried by the [Netherlands] Supreme Military Court must be rejected as incorrect, and in connection with this the question as to whether appellant should be considered a prisoner of war in the sense of the said Convention needs no answering.

" Therefore this Court will neither go into the question as to whether the Special Court [in the first instance] had rejected the appellant's

(1) Art. 52 of the Geneva Convention, 1929, which reads as Art. 49 of the Preliminary Draft quoted above.

(2) Published in French, under the title *Documentation préliminaire fournie par le Comité International de la Croix Rouge*, Geneva, 1947.

appeal to Art. 46 of the said Convention on good grounds, for as appears from the above this provision could only be applicable if appellant was tried for crimes committed during captivity as a prisoner of war."

In this manner the above findings bring in the foreground the decisive factor or element for determining the type of cases in which the Geneva Convention is applicable to prisoners of war in the field discussed. The latter applies only in regard to offences committed during the period of captivity. Therefore its rules are not attached to the status of " prisoner of war " taken in itself, but only insofar as a prisoner of war has been guilty of offences incidental to his captivity. From this it follows that a prisoner of war guilty of war crimes which, by virtue of the very nature of the circumstances involved in such cases were committed prior to captivity, can derive no benefit of the status acquired as a consequence of his capture with regard to offences which he had committed prior to having been taken prisoner. He is then regarded as any other alleged war criminal and, in spite of his status of prisoner of war, tried under the rules in force for persons prosecuted for war crimes.

4. THE RULE " NULLA POENA SINE LEGE "

In the course of the proceedings before the first Court the accused had pleaded that, in addition to the lack of jurisdiction of the Netherlands courts as claimed by him, he could be neither tried nor punished for the following two reasons :

(*a*) At the time of the alleged crimes there was no law according to which those who had violated the laws and customs of war could be punished by a foreign State.

(*b*) In the Netherlands the acts charged were made punishable for the first time by Art. 27 (A) of the Extraordinary Penal Law Decree, that is after the alleged crimes were committed.

The accused contended that for these reasons the trial was held under the terms of retrospective legislation, in violation of the general principle, explicitly recognised in Netherlands law, that no act could be punished without the existence of prior rules concerning both the offence and the penalty (*Nullum crimen, nulla poena sine lege*).

This plea was considered and rejected by both Courts.

The provision invoked by the accused from the Netherlands Law was Art. 1 of the Penal Code, which reads as follows :

" No act is punishable except in virtue of a legal provision which has preceded that act. Should there be a change in the legislation after the date on which the crime was committed, the provision most favourable to the accused shall then be applied."

The effect of this provision was suspended in the sphere of war crimes and the other offences justiciable under the terms of the Extraordinary Penal Law Decree No. D.61 of 22nd December, 1943. This was done by Art. 3 of the said Decree :

" For the operation of this Decree the rule laid down in Art. 1 of the Penal Code is irrelevant."

The first court made express reference to this exception but did not wish to confine itself to this argument. It stressed at the same time that the rules under which violations of the laws and customs of war were punishable in international and Netherlands law did not constitute a new legislation, but only a statement of pre-existing laws. The court entered first into the question of the legal basis for suspending the effect of the rule " Nullum crimen, nulle poena sine lege " :

> " The question can be put as to whether the [Netherlands] legislator was competent to make Art. 1 of the Penal Code inapplicable as far as the trial of war criminals is concerned, especially as Art. 23 (*h*) of the Rules of Land Warfare forbids that the rights and claims of the opponent's subjects be declared invalid, suspended or inadmissible.(1) This Article, however, only forbids a discriminatory treatment of enemy subjects and its object is not to bring about changes in the legislation which, as is the case in the present instance with the suspension of Art. 1 of the Penal Code, apply equally to its own subjects and to those of the enemy country. Moreover, it is generally accepted that the rules concerning war crimes and appearing in the Charter belonging to the London Agreement of 8th August, 1945, do not form a new law, but only a formulation of international law which already existed before the war and was prescribed in Conventions and especially in the Rules of Land Warfare, and which were therefore already made punishable in the . . . [Netherlands] Military Penal Code."

The findings of the Special Court of Cassation were entirely centred on this latter feature, that acts for which the accused was tried were punishable under rules which preceded their commission :

> " Indeed the Hague Convention of 1907 relative to the Laws and Customs of War on Land . . . lays certain restrictions on the belligerent parties in their conduct towards each other and towards the population of the occupied territory, expressly forbids certain actions in it and at the same time . . . provides in the Preamble that ' in cases not covered by the rules adopted . . . the inhabitants and the belligerents remain under the protection and governance of the principles of the law of nations, derived from the usages established among civilised peoples, from the laws of humanity, and from the dictates of the public conscience.' Each deliberate transgression of these internationally established rules of warfare constitutes an international crime, and the appellant wrongly asserts that the criminal character of such actions has only now, afterwards, been provided. In doing so he loses sight of the fact that for a long time such transgressions have been known all over the world as ' oorlogs*misdrijven*,' ' *crimes* de guerre,' ' war *crimes*,' ' kriegs*verbrechen*,' etc., while even before the Second World War the imposition of punishment for such acts took place in several countries, among them Germany.
>
> " The appellant has also incorrectly asserted that Art. 27 (A) of the Extraordinary Penal Law Decree has introduced a new ' crime against

(1) Article 23 (h) of the Hague Regulations provides as follows :

" In addition to the prohibitions provided by special conventions, it is particularly forbidden . . . (h) to declare abolished, suspended or inadmissible the right of the subjects of the hostile party to institute legal proceedings."

humanity' ; indeed this was in so many words subjected by the said Preamble to the ' laws of humanity,'

" From what appears above it follows that neither Art. 27 (A) of the Extraordinary Penal Law Decree nor Art. 6 of the Charter of London to which the said Netherlands provision of law refers, had, as the result of an altered conception with regard to the unlawfullness thereof, declared after the event to be a crime an act thus far permitted ; . . . these provisions have only further defined the jurisdiction as well as the limits of penal liability and the imposition of punishment in respect of acts which already before [their commission] were not permitted by international law and were regarded as crimes.

" The appeal which has further been made by the appellant in this connection to Art. 23 (*h*) of the Rules of Land Warfare, misinterprets this provision, as the said Article . . . can only have a bearing on civil claims.

" In so far as the appellant considers punishment unlawful because his actions, although illegal and criminal, lacked a legal sanction provided against them precisely outlined and previously prescribed, his objection also fails.

" The principle that no act is punishable except in virtue of a legal penal provision which had preceded it, has as its object the creation of a guarantee of legal security and individual liberty, which legal interests would be endangered if acts about which doubts could exist as to their deserving punishment were to be considered punishable after the event.

" This principle, however, bears no absolute character, in the sense that its operation may be affected by that of other principles with the recognition of which equally important interests of justice are concerned.

" These latter interests do not tolerate that extremely serious violations of the generally accepted principles of international law, the criminal . . . character of which was already established beyond doubt at the time they were committed, should not be considered punishable on the sole ground that a previous threat of punishment was lacking. It is for this reason that neither the London Charter of 1945 nor the Judgment of the International Military Tribunal [at Nuremberg] in the case of the Major German War Criminals have accepted this plea which is contrary to the international concept of justice, and which has since been also rejected by the Netherlands legislator, as appears from Art. 27 (A) of the Extraordinary Penal Law Decree."

It will be noticed that the findings of the Court of Cassation include two separate issues on the subject. The first concerns the existence of rules according to which the acts charged against the accused constituted criminal offences at the time of or prior to their commission. The second relates to the punishment attached to such offences. In continental law this last issue is of particular importance as penalties for criminal offences are provided for by statutory law in express terms and with the designation of the specific penalty or penalties attached to each offence, as a rule in terms of the maxima and/or minima punishments. The main argument of the Court on this point was that, at least in the field of international criminal law as related to war crimes and crimes against humanity, express provision for the type

and severity of punishment was not an essential pre-requisite. Decisive was the fact that, in view of its seriousness, the offence was deserving of punishment under all standards of criminal justice of civilised nations.(1)

The above findings are in accord with those made by the International Military Tribunal at Nuremberg in the case against the major Nazi war criminals. In its Judgment the Tribunal made in the first place a statement on the nature and scope of the principle " Nullum crimen, nulla poena sine lege." It determined that the latter was " a principle of justice " and could not therefore result in consequences contrary to the aims pursued by criminal justice, one of which was that it would be unjust not to punish serious offenders for technical deficiencies, if any, of the existing law. This is what the Tribunal said in this respect :

> " In the first place, it is to be observed that the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defence of treaties and assurances have attacked neighbouring States without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished. Occupying the positions they did in the government of Germany, the defendants, or at least some of them, must have known of the treaties signed by Germany, outlawing recourse to war for the settlement of international disputes ; they must have known that they were acting in defiance of all international law when in complete deliberation they carried out their designs of invasion and aggression. On this view of the case alone, it would appear that the maxim has no application to the present facts."

As previously reported, in connection with the Netherlands Courts' findings on the severity of the punishment imposed upon Rauter, similar considerations were made regarding the accused's knowledge of the criminal nature of the acts tried at the time of their commission.(2)

The Nuremberg Tribunal then considered the issue of the existence of rules making the offences charged punishable prior to their having been perpetrated, and came to similar conclusions as the two Netherlands Courts. It lay stress on the fact that acts prohibited by international treaties or conventions needed not be " named crimes " in the relevant texts to constitute criminal offences. Neither was it indispensible that such treaties or conventions should contain express provision as to the penalties to be imposed. Both issues were guided by general principles of criminal law. With reference to the Kellog-Briand (Paris) Pact of 1928, which prohibited recourse to war for the solution of international controversies and which the Tribunal regarded as declaratory of the criminal nature of aggressive wars, the Tribunal made the following authoritative statement on the general issue of the criminal nature of violations of laws and customs of war, as provided against in international treaties and conventions :

> " But it is argued that the Pact [Kellog-Briand] does not enact that such wars are crimes, or set up courts to try those who make such wars.

(1) Compare the *Klinge Trial* in Vol. III, pp. 1-14.

(2) See p. 110 above.

To that extent the same is true with regard to the laws of war contained in the Hague Convention. The Hague Convention of 1907 prohibited resort to certain methods of waging war. These included the inhumane treatment of prisoners, the employment of poisoned weapons, the improper use of flags of truce, and similar matters. Many of these prohibitions had been enforced long before the date of the Convention ; but since 1907 they have certainly been crimes, punishable as offences against the laws of war ; yet the Hague Convention nowhere designates such practices as criminal, nor is any sentence prescribed, nor any mention made of a court to try and punish offenders. For many years past, however, military tribunals have tried and punished individuals guilty of violating the rules of land warfare laid down by this Convention. In the opinion of the Tribunal, those who wage aggressive war are doing that which is equally illegal, and of much greater moment, than a breach of one of the rules of the Hague Convention. In interpreting the words of the Pact, it must be remembered that international law is not the product of an international legislature, and that such international agreements as the Pact of Paris have to deal with general principles of law, and not with administrative matters of procedure. The law of war is to be found not only in treaties, but in the customs and practices of States which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practised by military courts. This law is not static, but by continual adaptation follows the needs of a changing world. Indeed, in many cases treaties do no more than express and define for more accurate reference the principles of law already existing."

In the light of the foregoing findings it follows that, in the case of Rauter, the plea concerning the maxim " Nullum crimen, nulla poena sine lege " was rejected on the grounds that the offences committed by him were punishable under rules in force at the time of the offences, and therefore preceding the acts tried in accordance with the maxim invoked by the accused.

A word or two should, however, be added in regard to the Netherlands provision which, as previously explained, suspended the effect of the maxim discussed in the field of war crimes and of the other offences punishable under the Netherlands Extraordinary Penal Law Decree of 22nd December, 1943. The said provision should be understood within the meaning stressed by both the Netherlands Special Court of Cassation and the International Military Tribunal at Nuremberg. This means that, fundamentally, the suspension of the maxim does not result in the punishment of an act which was not criminal and punishable at the time of its commission. The suspension rather relates to the technical insufficiencies of the written law, in particular in countries, such as Holland, where criminal matters are solely or chiefly governed by rules of Statutory Law. Its effect then is only to enable trial and punishment where either or both would seem to be barred for lack of texts containing systematically arranged provisions as to crime and punishment in each given type of acts liable to punishment.

An indication as to such an effect in Netherlands law of the suspension of the maxim discussed, is given in the attitude of the Special Court of Cassation prior to the enactment of Art. 27 (A) of the Extraordinary Penal

Law Decree of 22nd December, 1943. As explained elsewhere,(1) at that time the Court denied jurisdiction over war crimes to the Netherlands courts in the first instance for lack of municipal provision placing such offences explicitly within the scope of their competence. It did so in spite of the suspension of the maxim effected by Art. 3 of the Extraordinary Penal Law Decree, which, if understood otherwise than explained above, could have been interpreted so as to make punishable any act not provided against by the then existing Netherlands laws. Another indication is given by the very introduction of Art. 27 (A), without which the Special Court of Cassation did not feel that war crime trials could be held by Netherlands courts even with the maxim " Nullum crimen " suspended. Art. 27 (A), while giving jurisdiction to the courts to apply laws and customs of war relative to war crimes and crimes against humanity, provided that punishment was to be imposed in accordance with existing provisions of the Netherlands Penal Code. This implied the principle contained in the maxim " Nullum crimen " that as regards both the offences and the penalties, the relevant rules were to be and were in fact pre-existent to the acts tried.(2)

5. PERMISSIBILITY OF " REPRISALS "

The major issue of substantive law in the trial under review was that of the permissibility of reprisals.

Granted the Netherlands Courts' competence to try him, and granted also that the trial was not held on the basis of *ex post facto* rules of law, the accused's main defence was that he was relieved of the duty to abide by the laws and customs of war governing the conduct of the occupying Power towards inhabitants of occupied territory, and was, as a consequence, entitled to take reprisals. The accused's defence was that all acts undertaken by him against the Netherlands civilian population were committed as justified reprisals for acts of violence perpetrated by the same population against members of the German occupying authorities.

The arguments of the accused raised several legal issues of importance in regard to his defence, which were intimately connected with, but nevertheless additional and in a sense preliminary to the question as to whether and to what extent the accused was entitled to and did resort to justified reprisals. These issues concerned the effect of an act of surrender, as evidenced in the Netherlands instrument of capitulation of May, 1940, upon the inhabitants and the Government of an occupied country in their relationship with the authorities of the occupying Power. This in turn raised the problem as to whether and, if so, in what circumstances, the civilian population of an occupied territory is entitled to resist the occupant by resorting to acts of violence against him.

It is after due consideration of these issues that the courts approached the problem of justified and unjustified, lawful and unlawful reprisals. Their jurisprudence on this subject is welcome as the question of reprisals is one of great difficulty in international law. As already reported elsewhere,(3) and as stressed by Lord Wright, no complete " law of reprisals "

(1) See *Annex* to Vol. XI, pp. 89-90.

(2) Regarding the plea of *nullum crimen, nulla poena sine lege*, see also Vol. IX, pp. 32-9.

(3) See Vol. VIII of this series, pp. 27-8.

in time of war has yet developed. The limitations of reprisals in time of war are still not well defined, and regarding the applicable rules, one has chiefly to rely on the opinion of learned publicists and on judicial precedents of a differing nature. The Netherlands courts gave, on the occasion of this trial, important views on the subject which will, undoubtedly, contribute to the gradual elimination of the existing uncertainty and difficulties.

(i) *Effect of an Act of Surrender (Capitulation)*

The accused's plea in respect of the Instrument of Capitulation of the Netherlands Forces of 15th May, 1940, was, it will be recalled, that it imposed obligations upon the Netherlands civilian population to refrain from any hostile act against the German occupying authorities, and also upon the Netherlands Government to refrain from orders, or instructions in violation of this obligation. The main argument used in this respect was that the said Instruments were in the nature of a Treaty and had therefore a binding effect upon the Netherlands Government and its subjects.

The above Instrument, officially known as " Conditions for the Surrender of the Netherlands Forces " (Bedingungen für die Uebergabe der Niederländischen Wehrmacht), was signed by the Netherlands Commander-in-Chief of the Combined Army and Navy, General Winkelman. It contained among others, the following provision (Article 5) :

> " An order is to be issued(1) to the administration of towns and communes that every hostile action against the German Army, its members and establishments must be refrained from and that absolute peace and order must be maintained. It must be pointed out that actions to the contrary will be severely punished according to German law."

Recognition was made of a fact which was to be used by the Courts in their findings, that not the entire Netherlands territory was as yet occupied at the time of the surrender :

> " German troops will not occupy that part of Netherlands territory not yet occupied by them."

It was also acknowledged that the settlement was not final, and that this was to be reached only by means of further negotiations.

Provision was made that the " occupation was to be assisted by the Netherlands authorities in every way." The above Instrument was accompanied by two additional documents known as " Points of Negotiations " (Verhandlungspunkte) and " Appended Protocol " (Zusatzprotokoll) which were signed on behalf of the Netherlands Commander-in-Chief. The first contained a clause according to which all Netherlands police forces were to be " retained in service."

The first Court made the following findings in regard to the accused's plea as related to the above documents :

> " The Court does not share the view of Counsel and the accused that from this it follows that it was the duty of the Netherlands Government in London to refrain from inciting the population in the Netherlands to resist the enemy.

(1) By the Netherlands authorities.

" According to international law a capitulation treaty is a pact between commanders of belligerent forces for the surrender of certain troops or certain parts of the country, towns or fortresses, and as such must be scrupulously fulfilled ; the commander who concludes such a pact cannot, however, be considered empowered to bind his government to a permanent cession of territory, to a cessation of hostilities in territories which do not come under his command or, in general, to provisions of a political nature ; such provisions are binding in a capitulation treaty *only if they are ratified by the governments of both belligerents.*(1)

" . . . The pacts to which the defence appeals are purely a capitulation treaty with an agreement for further regulations as to how the same is to be carried out, . . . which pacts had no political implication and therefore also *laid no obligations on the Netherlands Government or on the population of the occupied territory.*(1) The Court is strengthened in this conviction by the circumstance that no appeal was ever made to these pacts from the German side during the occupation to demonstrate that the Government in London was acting unlawfully, and these pacts were never made public or accompanied by an admonition to the Netherlands population to keep calm, which in the circumstances the occupying Power would never have failed to do had it been of the opinion that these pacts contained the implication which the defence now wishes to attribute to them.

" These pacts were strictly adhered to on the Netherlands side, in particular Article 5, in which it was laid down that an order was to be given to the Netherlands population that it must refrain from hostile acts and keep absolute peace, was carried out.

" On these various grounds the Court also considers that the Netherlands Government in London *was justified in inciting to resistance*(1) in this country, and it cannot be reproached for having had arms dropped for this purpose on occupied Netherlands territory from aeroplanes, which formed part of the allied war operations against Germany for which the Netherlands Government does not bear the sole responsibility."

The Special Court of Cassation concurred with the above views in the following terms :

" The Capitulation contains not a single provision which lays obligations on the Netherlands population with regard to the occupant or which would oblige the Netherlands government to anything more than to acknowledge this happening as a lawful capitulation.

" . . . At 4.50 p.m. on 14th May, 1940, without a previous agreement with the invading enemy, the [Netherlands] Commander-in-Chief of the Land and Sea forces [General Winkelman] gave the order to the commanders of the forces in this country to lay down their arms.

" . . . In this meeting [with German representatives] held on 15th May, 1940, there could be no question of negotiations over a capitulation pact to be concluded, and the Commander-in-Chief could then also receive orders from the enemy only in connection with the situation

(1) Italics are inserted.

which had arisen, and at the most could possibly protest against unlawful regulations, as in fact he did do with regard to certain provisions.

" The signing of the so-called ' Bedingungen für die Uebergabe der Niederländischen Wehrmacht ' by the Commander-in-Chief, and similarly *a fortiori* the signing of the two documents following on this, respectively named ' Verhandlungspunkte ' and ' Zusatzprotokoll,' by the commanders under him, *did not thus bear the character of a pact with the enemy forces, but are simply to be considered as a proof of the receiving of orders given them.*(1)

" These and subsequent orders were only legally valid insofar as they related to that part of the Kingdom of the Netherlands brought by the enemy under his power and those Netherlands forces present in that part, with the exception for a short time of Zeeland, and in so far as they were of a military nature.

" As is apparent from the contents of the documents mentioned above the proposition is also particularly incorrect that the so-called capitulation pact was concluded by General Winkelman in his capacity as exceptional bearer of the Netherlands governmental authority in the occupied territory, and that his further measures for the putting into execution of the German orders were generally binding rules for the Netherlands population.

" Therefore there can be no talk of violation of a pact, and this also, as appellant has argued, by other authorities than those which concluded it, and at the most there could possibly be a question of non-compliance with enemy military orders by the Commander-in-Chief.

" . . . In particular, in accordance with Article 5 of the ' Bedingungen ' he [the Commander-in-Chief] had an order given to the municipal authorities and to the population to refrain from any hostile action against the German army, its members and institutions, and to remain unconditionally quiet—in which spirit also H.M. Queen Wilhelmina addressed herself immediately to the Netherlands population—and in accordance with Article 1 of the ' Bedingungen ' the Commander-in-Chief did his duty in handing in weapons and ammunition by the Netherlands forces.

" With the carrying-out of these and other orders contained in the ' Bedingungen ' and its appended documents the immediate results of the capitulation were effected, and henceforth the occupied Netherlands territory came by rights under the régime of the military occupation described in Section III of the Rules of Land Warfare.

" Even if, as the appellant has shown he desired, the orders given by the German commander to the Netherlands forces after their capitulation were to be extended still further by considering the Netherlands Government as bound for the whole of the future duration of the war by obligations analogous to those laid by the enemy on the Commander-in-Chief, exclusively in that capacity, with temporary effect for the transition of a state of war into that of a military occupation,

(1) Italics are inserted. By using the term " pact " in this context the Court presumab meant " Treaty " binding as between States.

the appellant's ground for complaint would still not hold good in any respect.

" Even in a trend of thought of that sort such a permanent lack of freedom would presuppose the occupier himself living up to his obligations in accordance with the Rules of Land Warfare, an assumption which in no way applies to the German conduct of the war and of the occupation, as will be further explained hereunder when discussing appellant's appeal to reprisals."

(ii) *Right to Resistance of Inhabitants of Occupied Territory*

In close connection with the conclusions reached on the subject of the effect of the Surrender in 1940, the first Court came to the further conclusion that the Netherlands civilian population was under no legal obligation to obey the orders of the occupant and, as a consequence, to refrain from acts of violence against him. Resistance to the enemy during the occupation could be " a permissible weapon." While recognising such a right, the Court stressed, however, that if no violation of a legal obligation were involved, acts of violence nevertheless gave the occupant the right to answer resistance by retributive action, *i.e.*, by the imposition of penalties which would not conflict with the laws and customs of war. This implied in the first place that punishment would affect only a person proved guilty of an act of violence, and in no case innocent people. The instance chosen by the Court to illustrate the issue was that of espionage.

The Court's findings on the subject were expressed in the following terms :

" The Court will grant the accused that, viewed from the German standpoint the resistance in the Netherlands to the occupying Power could be considered as unlawful because the illegal fighters in the Netherlands did not fulfil the requirements concerning legal fighting forces as prescribed by the Rules of Land Warfare,(1) and the accused was therefore justified in acting against this resistance.

" To avoid any misunderstanding the Court here wishes to add that from the Netherlands point of view this matter can be considered differently, because the occupying Power only exercises a factual and not a legitimate authority,(2) so that the population of the occupied territory is in general neither ethically nor juridically obliged to obey it as such ; it follows from this that resistance to the enemy in the occupied territory can be a permissible weapon ; there is no contradiction in this because such cases appear more than once in the Rules of War, especially in the case of espionage which is considered as a lawful weapon, while at the same time the belligerent party, which gets hold of a spy belonging to its opponent, has the right to punish such spy, even with death."

Art. 29 of the Hague Regulations contains a description of who is considered to be a spy, and Art. 30 provides that no spy can be punished without proper trial.

(1) This is a reference to Arts. 1 and 2 of the Hague Regulations, according to which the status of belligerent is recognised to irregular combatants under certain conditions two of which are essential : that they carry their arms openly, and that they respect the laws and customs of war.

(2) This is a reference to Art. 43 of the Hague Regulations, according to which the occupying Power exercises only a *de facto* authority in occupied territory.

It should be noted that similar conclusions were drawn by other Netherlands courts on the occasion of other trials. In the trial of Friedrich C. Christiansen,(1) senior commanding officer of the German Army in occupied Holland (Wehrmachtsbefehlshaber), the defence included the argument that the offences with which the accused was charged, had been committed in reply to acts of " illegitimate " resistance committed by the inhabitants in violation of their alleged obligations to refrain from inimical conduct towards the occupant. The Court denied the existence of " illegitimate " resistance, on the grounds that, insofar as international law regulated the way in which a war and an occupation must be conducted once a war had started, the law makes no distinction between a lawful or an unlawful war, or between legitimate or illegitimate occupation. Both lead to the same consequences as to the laws to be observed for the duration of the war between belligerents and between occupant and occupied. As a consequence there was neither a distinction to be drawn between " legitimate " and " illegitimate " resistance. The inhabitants were in any case under no obligation to refrain from " attacks on the army of occupation," so that the occupant could never derive from such attacks the right to act in violation of the laws and customs of war. What he could and was entitled to do is to impose penalties upon those who were guilty under the terms of occupational laws and regulations, in accordance with rules of international law. The Court referred also to the case of spies.

The relevant parts of the findings in the above trial read as follows :

> " The Court wishes . . . to let it be known as its considered judgment that it does not subscribe to the arguments on the grounds of which counsel considers the resistance committed in the present case to be illegal.
>
> " Counsel has certainly advanced that it is a rule of International Common Law that the civilian population must refrain from attacks on the army of occupation, but the Court denies that such a rule would exist in the sense that the civilian population would be violating a duty in law towards the occupant by acts of resistance such as occurred here.
>
> " As long as International Law, when regulating the way a war and an occupation should be conducted, does not discriminate between a legitimate and an illegitimate occupation, a rule of that sort would be unthinkable.
>
> " If such a rule does exist its only meaning is that the civilian population, if it considers itself justified in committing acts of resistance, must know that, in general, counter-measures within the limits set by international law may be taken against them with impunity. . . .
>
> " The above explanation of the alleged rule is in complete agreement with the rules of international law concerning espionage, according to which a belligerent violates no right of the opposing party by making use of espionage, while on the other hand espionage may be countered with impunity by the opposing party, who may inflict the severest penalties on the spies themselves."

(1) Judgment of the Special Court in Arnhem, pronounced on 12th August, 1948.

It thus appears that, according to the Netherlands Courts, the relationship between an occupying Power and inhabitants of an occupied territory is guided by the following rules or principles :

Inhabitants of occupied territory are expected to maintain a peaceful attitude towards the occupant. This, however, is not in the nature of a legal obligation and does not, in law, prevent inhabitants from resorting to hostile acts towards the occupant. The main legal consequence of this situation is that, where inhabitants commit hostile acts, the occupant is not relieved from the duty to abide by the laws and customs of war governing its conduct towards the inhabitants. Therefore, he may not commit acts of arbitrary revenge against them. Breaches of peaceful occupation on the part of the inhabitants entitle the occupant to take proper steps against the offenders, in accordance with the laws and customs of war. These require that the offenders should be given fair trial, with full protection of their right to defence, and that no excessive punishment should be imposed, having regard to the nature of the offence and the degree of the accused's guilt.

In connection with the Netherlands Courts' findings on this subject, it should be noted that one of the Court laid stress on a special type of cases. It referred to cases where the inhabitants had committed acts of violence *in self-defence* of similar acts being committed by the occupant against them. In such cases, said the Court, the acts resorted to by the inhabitants were " a justifiable defence which the occupant may not punish or answer by reprisals."(1)

(iii) *Legitimate and Illegitimate Reprisals*

The question what are legitimate and illegitimate reprisals is, as previously stressed, one of difficulty in international law.

In the theory concerning reprisals in time of peace it is generally agreed that the latter are permitted as a means of enforcing international law. They are one of the two main expressions of self-help on the part of States, the second being war waged in defence of a State's right violated by another State. As such they are an answer to international delinquency and, in time of peace, they constitute a mode of compulsive settlement of disputes wherever negotiations or other amicable means of settlement have failed. The emergence of international bodies, such as the League of Nations and the United Nations, has caused some authoritative writers to raise the issue as to whether, after the acceptance by Governments of obligations regarding the pacific settlement of international disputes, States are still entitled to make use of compulsive means of settlement between themselves, including reprisals. The opinion has been expressed that " so long as the renunciation of the right of war," as one of the two major means of compulsive settlement(2) " is not accompanied by an obligation to submit

(1) Judgment of the Special Court at Arnhem, in the case against Friedrich Christiansen, delivered on 12th August, 1948.

(2) In contradistinction to a war of aggression, which is an international crime, wars resorted to in self-help of the violation of a State's right are not illegal. With the exception of self-defence to a military aggression, their permissibility in other cases has, however, been affected by the Charter of the United Nations. See on this point, Hans Kelsen, *Collective Security and Collective Self-Defence under the Charter of the United Nations*, American Journal of International Law, 1948, Vol. 42, No. 4, pp. 783-796.

disputes to obligatory judicial settlement, and so long as there is no agency enforcing compliance with that obligation and with the judicial decision given in pursuance thereof, *reprisals*, at least of a non-forcible character, *must be recognised as a means of enforcing international law.*(1)

Similar conclusions, though for other reasons, were made in regard to reprisals in time of war. It was stressed that " reprisals between belligerents cannot be dispensed with, for the effect of their use or the fear of their being used cannot be denied.(2)"

The above considerations are illustrative of the fact that international law recognises reprisals, admittedly within certain conditions and limitations, and thus opens the further issue as to what is to be regarded as lawful and what as unlawful reprisals.

We are concerned here with this issue only as it arises in time of war. It is then confined to cases where one belligerent violates or is alleged to have violated the rules of warfare and the other belligerent retaliates in order to bring about a cessation of the existing or alleged violations. The problem with which one is then faced consists in that, as was judiciously observed, " a war crime does not necessarily cease to be such for the reason that it is committed under the guise of reprisals," but that, on the other hand, " as a rule, an act committed in pursuance of reprisals, as limited by International Law, cannot properly be treated as a war crime."(3) The problem consists in determining the scope and nature of acts which the retaliating party is deemed entitled to undertake.

In their findings the Netherlands Courts acknowledged the existence of legitimate reprisals in time of war, and thereby the need to distinguish them from acts constituting abusive or illegitimate reprisals. The findings were made with particular regard to the killing of hostages and other innocent members of the Netherlands civilian population.

The Special Court in the first instance made the following preliminary observations :

> " It is a fact generally accepted that a belligerent has the right to take reprisals as a requital for unlawful acts of war committed by the opponent.
>
> " There exists a doubt over the question as to whether a collective fine may be imposed and innocent citizens killed by way of reprisal."

The Court then laid stress on the fact that " Germany is the only country in modern times which has proceeded with the killing of innocent citizens in occupied territory for the purpose of maintaining peace and order . . . in a manner contrary to the most elementary conceptions of humanity and justice." Reference was made to the Judgment delivered by a United States Military Tribunal at Nuremberg in the trial of Wilhelm List and others,(4) and it was stated that the Netherlands Court " associated itself " with that Judgment.

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(1) See Oppenheim-Lauterpacht, *International Law*, Vol. II, 6th Edition (Revised), p. 118. Italics are inserted.

(2) See Oppenheim-Lauterpacht, *op. cit.*, Section 247, p. 446.

(3) H. Lauterpacht, " The Law of Nations and the Punishment of War Crimes," *British Year Book of International Law*, 1944, p. 76.

(4) See Vol. VIII of this series, pp. 34-92, where considerations on the issue of reprisals are also to be found.

The latter was of the opinion that the killing of hostages was permissible only in exceptional cases, and in this connection made findings as to when such killings were prohibited and thereby constituted criminal acts. These findings included the opinion that it was unlawful to kill hostages if the actual perpetrators of the offence which gave rise to the taking of hostages were or could be found. This was also the case wherever such killings were excessive with regard to the original offence.(1) Reference was also made to the conditions required for reprisals in general by the British and American military regulations. These admit reprisals only as a measure of last resort which may never be taken for revenge but only as a means of inducing the enemy to desist from unlawful practices of warfare. They also require as a condition that the actual perpetrators of the original offence could not be found, and that there is due proportion between the acts undertaken in reprisals and the original offence.

On the grounds of the above principles, the Court found that in Rauter's case the alleged reprisals were all unlawful and for this reason criminal. It was found that the accused never made attempts to apprehend the actual perpetrators of the offences concerned, and killed hostages as a measure of revenge or intimidation. It was also found that by killing several hostages at a time for the death of one member of the German authorities, he had committed excessive reprisals in violation of the rule requiring due proportion.

The issue of reprisals was to be given an entirely different treatment by the Netherlands Special Court of Cassation. It enunciated a rule which excludes without exception the killing of hostages for offences committed by inhabitants of an occupied territory. These findings are of great importance and are therefore reported in detail.

The Special Court of Cassation approached the issue of reprisals from the general aspect of the parties legally involved in it, and came to the conclusion that these were and could be only the belligerent *States* themselves. Actual instances of reprisals taken by persons in the State's service, *i.e.*, State organs such as military or police officers, had no legal status of their own, but were derived from the legal position of the matter as between the States involved. This opinion was based upon the traditional principle that States were the primary subjects of international law, and that, consequently, in the sphere of reprisals they were the only subjects of the rights and duties involved.(2) The Court expressed its views in the following terms :

> " The aim of the defence is to argue that acts which, considered in themselves, are denounced by international law, can lose their unlawful

(1) For more details on the views of the American Tribunal concerned, particularly regarding the exceptional circumstances in which it is, in its opinion, permissible to kill hostages or other innocent persons, see *Trial of Wilhelm List*, Vol. VIII of this series, pp. 34-92.

(2) The above principle is without prejudice to the fact that, apart from States, individuals may also be subjects of international law. The whole field of war crimes and related offences, *i.e.*, crimes against humanity and crimes against peace, is governed by the principle of individual penal responsibility, and is thus based upon the premise that duties which international law imposes by prohibiting acts contrary to the laws and customs of war, are duties the subjects of which are individuals and not abstract entities, such as the State. The Court's findings do not go beyond the point, nor would anything in them warrant a different conclusion, that the right to legitimate reprisals does not belong to individuals, but only to the State, and that conversely violations giving rise to such a right can only be those committed by a State, and not by irresponsible individuals.

character on the grounds that they find their justification in the commission of acts which, according to international law, are unlawful and are committed by the opponent.

" However, in this defence appellant has not sufficiently distinguished between two types of cases which must be sharply differentiated.

" In the proper sense one can speak of reprisals only when a State resorts, by means of its organs, to measures at variance with International Law, on account of the fact that its *opponent*—in this case the State with which it is at war—had begun, by means of one or more of its organs, to commit acts contrary to International Law, quite irrespective of the question as to what organ this may have been, Government or legislator, Commander of the Fleet, Commander of Land Forces, or of the Air Force, diplomat or colonial governor.

" The measures which the appellant describes . . . as ' reprisals '(1) bear an entirely different character, they are indeed retaliatory measures taken in time of war by the occupant of enemy territory as a retaliation not of unlawful acts *of the State*(2) with which he is at war, but of hostile acts *of the population*(2) of the territory in question or *of individual members*(2) thereof, which, in accordance with the rights of occupation, he is not bound to suffer.

" Both types of ' reprisals ' have this in common, that the right to take genuine(3) reprisals as well as the alleged competence to take so-called ' reprisals ' may in principle belong only to the *State* which applies them, so that for a military commander the plea of the right to reprisals can only be a derived and not a proper personal defence, in the sense that this defence . . . is admissible only when the State in whose service the commander acted, was justified by objective standards of international law to take counter-measures, while if this were not the case the commander could possibly make a further plea only in regard to the exemption of—even if unlawful—orders, in which case the defence is to be dealt with as part of the general defence . . . derived from official [superior] orders."

The position thus taken by the Court was that the issue as to whether there was room for legitimate reprisals or whether acts undertaken to this end were unlawful, depended on whether the alleged initial violation was an act of the State, as represented by its organs, and not of individuals who were not or could not be regarded as acting in the State's name. It is from this position that the Court had concluded that the responsibility of State organs was subordinated to that of the State itself, and that in the circumstances the defence was always " a derived and not a personal defence." The success of any such defence depended primarily on the question whether the organ's State was, in view of the conduct of the other State and those representing it, justified in resorting to measures in the nature of reprisals through the organs involved. If the defendant had undertaken such measures on his own initiative, but within his sphere of competence, he had

(1) The Court used the French term " représailles," which is here substituted by the English term of the same meaning.

(2) Italics are inserted.

(3) The term is used in the sense of lawful or legitimate reprisals.

thereby acted on behalf of his State and committed the latter's responsibility. If he had acted upon instructions the position as regards the State's responsibility was the same, and then the only possible defence was that of superior orders. In such case his personal guilt would be considered on the grounds of circumstances such as whether or not he knew or could have known of the illegal nature of the orders, or whether or not his acts were, in spite of such knowledge, undertaken under duress and therefore under pressure of necessity. In the case tried, both Courts came to the conclusion that there was no grounds for admitting such a plea, including that the accused, as alleged by him, had acted out of necessity, in self defence or under duress. It was established that he had on many occasions taken the initiative, and it was held that, in view of his high position and other personal circumstances, he was or must have been aware of the criminal nature of his acts and of the instructions under which he had acted, and was never subjected to any pressure on the part of his superiors.

From the above preliminary and fundamental distinction the Court moved one step further and considered the issue as it presented itself in the specific instance of Germany and the Netherlands during the war of 1939-1945. It described the circumstances which, in theory, would have entitled Germany to resort to reprisals, and acknowledged that the object of reprisals, given the circumstances, could have included the Netherlands population. Its findings on this subject were made in the following terms :

> " The Court will . . . confine itself here to the question as to how far the former German Reich, as occupant of Netherlands territory, was entitled, in accordance with International Law, to take measures which are unlawful in themselves, but which could possibly be justified by a previous wrong done from the Netherlands side.
>
> " With regard to the right of the then German Reich to take *genuine* reprisals against the population of the Netherlands territory occupied by it, if the Netherlands could in fact be charged with any previous offence under International Law against the then German State, the latter . . . would be justified in striking against the population . . . by taking counter-measures, as is . . . recognised in the official explanation contained in the Rolin Report of 1899 concerning Art. 50 of the Rules of Land Warfare, which in 1907 remained unchanged on this point, and in which it was expressly stated that the said Article was enacted without prejudice to the question of reprisals, being a subject distinct from that of the " mesures de répression " [measures of repression] covered by the said Article.(1)
>
> " The objects against which genuine reprisals can be directed by an injured State on account of a previously committed offence under International Law by another State, need not be identical with those [objects] which were affected by the original wrong, and therefore the genuine reprisals, provided they are taken within certain limits and provided attention is paid to a certain proportion, can in principle be directed against all objects which in the given circumstances come into

(1) This is a reference to Art. 50 of the Hague Regulations, which prohibits the use of collective penalties and to which more consideration was to be given by the Court, as reported later. The Rolin Report is evidence that the drafters of Art. 50 had deliberately left open the question of reprisals proper, *i.e.*, of legitimate reprisals, as distinct from " measures of repression " disposed of in Art. 50.

consideration to this end, whether these be the land, sea or air forces of the enemy, other organs of his, his territory, merchant navy or property, his subjects wherever they may be, or the latter's property.

" Among the limits referred to, the prohibition should especially be mentioned of taking reprisals against prisoners of war, as this was expressly prohibited by Art. 2 of 1929 Convention relating to this matter(1).

The Court then entered into the question as to what was the nature of the specific relations that developed between Germany and Holland on account of the war. It reached the conclusion that no wrong had at any time originated from the Netherlands, but on the contrary from Germany, and that the latter had consequently never acquired the right to take reprisals against the Netherlands and its population. These findings were as follows :

" The appeal to this, in principle recognised, right of a belligerent State to take reprisals, provided they are of a permissible nature—eventually also against the population of occupied territory—cannot be of any avail to the defendant, as there was no previous international offence committed by the Netherlands against the then German Reich, so that the Reich mentioned had absolutely no right to take genuine reprisals.

" It is indeed generally known all over the world and also convincingly established by the International Military Tribunal in Nuremberg . . . that the former German Reich unleashed against the Kingdom of the Netherlands, as it did against various other States in Europe, an unlawful war of aggression, and by so doing began on its part to violate International Law, an international offence which in itself the Kingdom of the Netherlands was already justified in answering by taking reprisals against the aggressor.

" The then German Reich made its guilt even greater by making use, in the course of its military operations during the few days in May, 1940, of treacherous means prohibited by the rules of war, such as in seizing by surprise important strategical objects—bridges,—. . . by means of misuse of Netherlands uniforms, contrary to Art. 23 (*f*) of the Rules of Land Warfare ; by means of Netherlands traitors in its service who were instructed how to achieve this result ; and by the bombing of a city—Rotterdam—before the expiration of a regular ultimatum."

" After the military operations proper the then German Reich continued consistently with the commission of new violations of International Law, by, among other acts, withdrawing recognition to the lawful head of the Netherlands State ; setting up in this country a civil administration which was made independent of a military commander ; carrying out systematic Nazification of the Netherlands ; increasingly persecuting Jewish Netherlanders ; compelling Dutch workers [to take part] in the German war effort and industries ; and many other measures prohibited by International Law.

" Thus the Kingdom of the Netherlands far from being by law liable to endure reprisals from the German side, would have, on the contrary

(1) Geneva Convention relative to the Treatment of Prisoners of War.

been justified on all these grounds to take measures of reprisal against the then German Reich of its own right, against which reprisals, permitted by International Law, no counter-reprisals from the German side would have been allowed."

Having come to the above conclusions, and reached the point according to which the accused, as representing the Reich, could derive no legal title from his State to resort to legitimate reprisals, the Court approached, as a separate issue, the question of those acts which the accused had undertaken in retaliation to acts committed by individual Dutch subjects. In view of its findings concerning legitimate reprisals, the Court classified all such acts as " so-called," that is illegitimate " reprisals." It declared that such " so-called reprisals " were subject to the rule contained in Art. 50 of the Hague Regulations, and from this it derived the principle that in no case could such measures affect innocent people. It confirmed the views expressed by the first Court, that by committing hostile acts against the occupant, the inhabitants violated no legal obligation, but that at the same time the actual offenders were liable to suffer adequate penalties on the part of the occupant, imposed within the limits set by International Law. These findings were made in the following terms :

" With regard to retaliatory measures, indicated above as ' so-called reprisals,' of an occupant against hostile acts committed by the population of the occupied territory, this Court wishes here to postulate that, leaving aside the question as to how far the inhabitants of occupied territory, having regard to the risk for their own compatriots, should refrain from acting contrary to the regulations of the enemy in order to prevent retaliatory measures against the remaining population, there can be no question of a duty in law on the part of individual civilians to obedience towards the enemy.

" Unlike the genuine reprisals dealt with above, which the Hague Peace Conferences did not wish to prejudice and which they left unsettled, the ' so-called reprisals ' being retaliatory measures against inhabitants of occupied territory on account of punishable acts by other inhabitants, have certainly found a ruling, namely in Article 50, final part, of the 1907 Rules.

" This Article expressly forbids the imposition of collective penalties, of a financial or other nature, against the population in the matter of individual acts for which they could not be considered jointly and severally responsible.(1)

" From the history of this Article's coming into being it appears that the original aim was nothing more than to restrain as narrowly as possible the occupant from imposing fines on the population as a ' mesure de répression ' in answer to reprehensible or hostile acts by individuals ;

" These retaliatory measures are not regarded as prohibited only in cases of joint responsibility of the population itself. They are therefore *never permitted against innocent persons.*(2) The Conference, later

(1) Art. 50 reads : No collective penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which it cannot be regarded as collectively responsible.

(2) Italics are inserted.

expressly declared that this provision originally drafted only for fines, was applicable to all other collective penalties (Rolin Report of 1899 on Article 50).

"The basic idea of this Article is apparently that an occupant of foreign territory—no more indeed than the lawful sovereign or the occupant in his own territory—may not take steps against the innocent for deeds of others.

"In fact such a behaviour, both in the home country as well as in occupied territory, is contrary to all principles of justice and is incompatible with an international convention, in the Preamble of which it is expressly laid down that in the cases not included in the Rules appended to it the inhabitants . . . remain under the protection and governance of the principles of the laws of nations, derived from the usages established among civilised peoples, from the laws of humanity and from the dictates of the public conscience."(1)

The major point in the above detailed findings is the way in which the Court had treated the question as to where the original wrong lay. It took the view that a violation of international law could and had in fact been committed on the occasion of the opening of hostilities between the belligerent Powers concerned. In the solution adopted by the Court this included the issue as to which of the two Powers was guilty of a war of aggression against the other. This opinion was based upon the recent developments of International Law on the subject of aggressive wars. Since the enactment of the Nuremberg and Far Eastern Charters, and the judgments pronounced in the trials of major war criminals held by the International Military Tribunals at Nuremberg and Tokyo, it is an established rule that wars of aggression constitute an international crime, and that those responsible are liable to penal proceedings and sanctions. This position furnished the grounds for the opinion that the launching and waging of a war of aggression against the Netherlands—which is also an established fact,(2)—was an illegal act which, on the one hand entitled the Netherlands State to resort to acts of retaliation, and on the other hand, deprived Germany and persons in its service of the right to answer this by what was alleged to constitute legitimate reprisals.

It will be recalled that the Court referred also to violations incidental to the aggression and affecting rules of a proper conduct of military operations. It also made a strong point of the conduct of the occupant towards the inhabitants during the occupation, and thus strengthened the attitude taken on the subject of the initial wrong done by the enemy by launching a war of aggression. The violations mentioned in regard to the opening of hostilities concerned treacherous means of warfare, whereas those referred to in regard to the period of occupation included the improper establishment of civil administration, attempts at Nazifying the occupied territory, persecutions of the Jews, and the seizure and deportation of inhabitants to slave labour. These breaches of international law were referred to with a view to showing

(1) Quoted from the preamble to the IVth Hague Convention concerning the Laws and Customs of War on Land, 1907. The "appended Rules" referred to by the Court are those of the Hague Regulations respecting the above laws and customs.

(2) See *Judgment of the International Military Tribunal for the Trial of German Major War Criminals*, H.M. Stationery Office, London, 1946, pp. 30-31.

that, even regardless of the criminal nature of a war of aggression, the invader and occupant behaved so as to originate violations of the laws and customs of war, and thus, for this reason, lost legal title to claim legitimate reprisals. The fact that such violations were committed by German official organs implicated the German State and created, in this instance as well, a wrong committed by the State at war with the Netherlands.

The premise that reprisals implicate States and not individuals was at the root of the findings made in regard to acts committed against the occupant by the Netherlands population. It will be recalled that the Court had stressed, in this respect, that the defendant had acted in retaliation " not against unlawful acts of the *State* with which it was at war, but against hostile acts of the population of the territory in question, or against *individual members* thereof."(1) The feature implied in the above finding is that the population bears no portion whatever of the State's attributes and can therefore never be assimilated to individuals in the State's service. As a consequence, when committing hostile acts against the occupant, members of the population acted on their own behalf without committing the Netherlands State. This in turn deprived the accused of the pre-requisite that, in order to be entitled to take reprisals, he should have been faced with violations committed by the opposing State itself.

It is from the above theory that the Court drew the logical consequences as to the nature and limitations of the alleged reprisals taken against the Dutch population, and in this connection of the nature and limitations of the hostile acts committed by the same population against the occupant. With reference to the last point, as previously seen, the Court of Cassation concurred with the views of the first court that, by committing such acts, the population did not violate a legal obligation, but that at the same time the individuals concerned were liable to punishment by the occupant. It is the scope of this right to punish acts of individual members of the civilian population that the Court approached with particular care.

The preliminary answer given on this issue was that, as the occupant had no right to resort to reprisals, he could not strike at individuals who had nothing to do with the offences committed, and consequently was not entitled to retaliate against hostages or other innocent persons. This implied the general rule that, wherever the occupant is not entitled to legitimate reprisals, his powers to impose punishment are strictly confined to the actual offenders. In the Court's opinion this rule derived from Art. 50 of the Hague Regulations which forbids the imposition of " collective penalties " of any kind, " pecuniary or otherwise," upon the population wherever it cannot be regarded as " collectively responsible " for acts of individuals. The Court was of the opinion that, as appeared also in the light of the history of Art. 50, the latter implied that collective penalties were in any event to affect only guilty persons as the provision dealt with groups of persons collectively " responsible." This left out of the picture innocent persons, and as a result so-called hostages as well.

It should be observed that one of the main consequences of the above findings is the emergence of a general rule regarding the issue of the killing of hostages. The rule which emerges is that offences committed by members

(1) See p. 132 above.

of the *civilian population* of an occupied territory can *in no case* entitle the occupying Power to kill hostages. All it is entitled to do is to punish the actual offenders, if it can lay its hands on them. The importance of this rule lies in that the killing of hostages, as practised by the Germans since 1870-1871, and in particular during the first and second World Wars, had invariably taken place as a retaliation to hostile acts of the civilian population.

This rule is in accord with the views expressed by classical writers, such as Grotius and Vattel, who refer to the practice of killing hostages as contrary to the laws of nature(1) and as a " barbarian cruelty."(2) It is also in full agreement with the most recent documents of international law. Art. 6 (*b*) of the Nuremberg Charter of 8th August, 1945, explicitly includes in its definition of war crimes the " killing of hostages." This was done without any qualifications and as evidence of the present state of international law, so that, according to the said definition, the killing of hostages is a war crime in any circumstances and does not allow for exceptions of any kind. It may further be observed that, such as it is, the definition of the Nuremberg Charter should be regarded as a mere expression of the general principle contained in the Preamble of the IVth Hague Convention of 1907 and referred to by the Court of Cassation. This principle was expressed in the following terms :

> " Until a more complete code of the laws of war can be drawn up, the High Contracting Parties deem it expedient to declare that, in cases not covered by the rules adopted by them, the *inhabitants* and the belligerents remain under the protection and governance of the principles of the law of nations, derived from the *usages established among civilised peoples*, from *the laws of humanity*, and from the *dictates of the public conscience*.(3)

There is no doubt that the killing of innocent individuals is, in Vattel's words, a " barbarian cruelty," and that, as such, it is contrary to the usages of civilised peoples, to the laws of humanity and to the dictates of the public conscience. The rule of Art. 6 (*b*) of the Nuremberg Charter can, therefore, be understood only as an explicit expression of the above principle in the specific matter of the killing of hostages.

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(1) Grotius, *De Jure Belli ac Pacis, Libri Tres*, Translation, Vol. II, edited by J. B. Scott, Clarendon Press, 1925, pp. 742-743.

(2) Vattel, *Droit des Gens*, London, 1758, I., Liv. II, Chapter XVI, p. 459.

(3) Italics are inserted.

CASE No. 89

TRIAL OF WILLY ZUEHLKE

BY THE NETHERLANDS SPECIAL COURT IN AMSTERDAM
(JUDGMENT DELIVERED ON 3RD AUGUST, 1948)
AND THE
NETHERLANDS SPECIAL COURT OF CASSATION
(JUDGMENT DELIVERED ON 6TH DECEMBER, 1948)

Legal Basis of War Crimes and Crimes Against Humanity—Illegal Detention as a Crime against Humanity—Denial of Spiritual Assistance a Criminal Offence—Plea of Superior Orders in Netherlands Law—Membership of Criminal Organisations in Netherlands Law.

A. OUTLINE OF THE PROCEEDINGS

The accused, Willy Zuehlke, a former German prison warder, was a member of the Waffen-S.S. during the war 1939-1945, and served as such in the German Security Police (Sicherheitsdienst, commonly known as S.D.). In the early stages of the occupation of Holland he was assigned the duty to guard persons detained in the prisons at Havenstraat and Weteringschans. He was there in command of the guards, and remained in office from the beginning of 1941 until September, 1944.

The accused was tried by the Special Court in Amsterdam, found guilty of several offences and sentenced to seven years' imprisonment, with extenuating circumstances.

Both the accused and the Prosecutor appealed to the Special Court of Cassation, which pronounced a judgment of its own. The guilt of the accused was confirmed and his sentence reduced to five years' imprisonment.

I. PROCEEDINGS BEFORE THE FIRST COURT

1. *The Charges*

The charges against the accused included two types of offences : complicity in illegal detentions and ill-treatment of the prisoners.

Under one count charges were made in respect of prisoners of the Jewish race. The accused was charged with having " co-operated in the German policy of humiliation and persecution of the Jews " in that he had :

(*a*) Intentionally " assisted in the illegal detention " of a number of Jews by " keeping and guarding them in illegal detention."

(*b*) Ill-treated Jewish prisoners by " striking them with the hand, fist or any other object suitable for striking," and by kicking them

" violently with a shod foot," whereby prisoners " were caused pain and some of them injured " ; and also by compelling Jewish prisoners to clean prison corridors with a tooth-brush and thereafter " emptying buckets of water over them."

Under a second count the accused was charged with similar offences against the prisoners irrespective of their race or religion. The part taken by the accused from this wider aspect was described as " co-operation in the maintenance of a policy of terrorism and brutality against defenceless arrestees." The charges included physical ill-treatment of the same nature as in the case of the Jews, and also, as a specific offence, denial of " spiritual aid," that is of the attendance of a priest, in the instance of prisoners sentenced to death prior to their execution.

All offences charged were described as having been committed "contrary to the laws and customs of war and to humanity." The accused was held guilty both as actual perpetrator and as a superior who had " permitted the German guards under his command " to commit similar acts.

Finally, the prosecution included, as a separate punishable circumstance, the fact that the accused was a member of " criminal organisations," the Waffen-S.S. and the Sicherheitsdienst (S.D.).

2. *Facts and Evidence*

The acts charged were substantiated by the testimony of eye-witnesses, who had themselves been prisoners under the accused's guard or who had served as guards under the accused. Their testimony contained the following facts :

On many occasions the accused beat Jewish prisoners with his hands or feet, or with objects such as keys, rubber truncheons and the like. He beat them on the face or the head. Jewish prisoners were ill-treated by him in a far more brutal manner than the other prisoners.

Evidence was also produced to the effect that the offices of a priest had been denied to prisoners sentenced to death.

3. *The Case for the Prosecution*

The prosecutor asked that the accused be found guilty under the terms of Art. 102 of the Netherlands Penal Code. This Article covers acts of persons " who in time of war lend assistance to the enemy or prejudice the State with respect to the enemy," and carries, in the absence of special circumstances specified in the Article, a maximum penalty of imprisonment for fifteen years. The Prosecutor's plea was made with regard to lesser punishments prescribed for the offence of illegal detention (Art. 282 of the Penal Code) and ill-treatment (Art. 300 of the same code.) In the absence of more serious consequences for the prisoner, such as severe bodily injury or death, illegal detention is punishable by a maximum of seven years and six months' imprisonment. Similarly, ill-treatment unaccompanied by serious consequences for the victim is punishable by a maximum of two years' imprisonment. No such serious consequences would apply in the accused's case.

4. *The Defence*

The accused pleaded that he had acted upon superior orders and under duress. His contention was that, as a member of the Waffen-S.S., he could not do otherwise than discharge his duties in accordance with orders and methods concerning the custody of prisoners applied by his unit.

5. *Findings and Sentence*

The accused was found guilty on both counts, that is of taking part in the persecution of Jews by illegally detaining and ill-treating them and of taking part in systematic " terrorism and brutality " by ill-treating prisoners altogether. The above offences were described as war crimes and/or crimes against humanity, as defined in Art. 6 (*b*) and (*c*) of the Nuremberg Charter, which constituted at the same time, under Netherlands municipal law, the crime of illegal detention punishable by Art. 282 of the Penal Code, and the crime of ill-treatment punishable under Art. 300 of the same Code.

The Court could not agree with the prosecution that the offences charged fell within the terms of Art. 102 of the Penal Code. If the latter were to be applied it would mean that the defendant, being an enemy, would have " lent assistance " to himself, and this was not the type of case covered by Art. 102(1).

The Court could also not agree that punishment could be imposed for the accused's membership of criminal organisations. The reason given was that the Netherlands metropolitan law had not provided for the punishment of such members and that there was consequently no legal basis for conviction on this ground. In addition, such membership did not add to or substract anything from the criminal nature of the acts committed by the accused against the prisoners.

The accused was acquitted of the specific charge that he was guilty of ill-treating prisoners by denying spiritual assistance to those condemned to death. The Court came to the conclusion that it had not been proved that such denial was contrary to the laws and customs of war. In addition, no evidence was to hand that it was the accused's duty to forward requests for spiritual assistance to the authorities concerned, or that such requests would have succeeded in view of the existing regulations.

The accused was sentenced to 7 years' imprisonment with extenuating circumstances. The circumstances taken into account were that the arrests followed by detentions " did not originate with the accused " and that the latter had " stupidly allowed himself to be carried along with the criminal stream of German terrorism, rather than acted with intent on his own initiative." It was also found that the ill-treatment inflicted was not of a " very serious nature " and that, by ill-treating prisoners, the accused had acted " rather on account of his rough nature than driven by the desire to attack his victims."

(1) The relevant passage of this Article reads as follows : " He who in time of war intentionally lends assistance to the enemy or prejudices the State with respect to the enemy, shall be punished with imprisonment not exceeding fifteen years."

II. PROCEEDINGS BEFORE THE SPECIAL COURT OF CASSATION

1. *Appeal of the Prosecution*

The Prosecutor appealed on two grounds.

While not raising again the issue as to the applicability of Art. 102 of the Netherlands Penal Code, he complained that the punishment imposed under the combined effect of Arts. 282 and 300 of the Penal Code did not correspond to " the gravity of the criminal actions committed by the accused," so that severer penalty should be imposed.

Objection was also raised in regard to the decision of the first court concerning the accused's membership of criminal organisations. The Court had established the fact that the accused belonged to organisations declared criminal by the International Military Tribunal at Nuremberg,(1) and was wrong in holding the view that such membership was not punishable within the jurisdiction of Netherlands Courts. According to Art. 10 of the Nuremberg Charter members of organisations declared criminal by the Nuremberg Tribunal were liable to prosecution by the " competent national authority,"(2) which included Netherlands officers competent for the prosecution of war crimes. Membership of a criminal organisation was in itself a war crime, and therefore fell within the jurisdiction of and was punishable by Netherlands courts.

2. *The Accused's Appeal*

The accused appealed on the following grounds :

That, as was admitted by the first Court itself, the illegal detention of prisoners under the accused's guard had not originated from the accused, but from other German authorities. The fact of having been in charge of the prisoners as a guard could not be regarded as complicity in their being illegally detained.

That the punishment was too severe and did not correspond with the gravity of the offences committed.(3)

3. *The Court's Findings and Sentence*

With respect to the prosecution's appeal the Court concurred with the first Court that the provisions of Netherlands Law applied by it were correctly implemented as to the nature of the offences, and that there was no room for applying Art. 102 of the Penal Code.

It dismissed the plea concerning membership of criminal organisations on the grounds that, in the case tried, such membership was only " a circum-

(1) Both the Waffen S.S. and the Sicherheitsdienst, of which the accused was a member, were declared criminal organisations by the Nuremberg International Tribunals. See *History of the United Nations War Crimes Commission and the Development of the Laws of War*, London, H.M. Stationery Office, 1948, pp. 313-315.

(2) Art. 10 of the Nuremberg Charter provides as follows : " In cases where a group or organisation is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organisation is considered proved and shall not be questioned."

(3) The accused appealed also on the ground that he could not be held responsible on account of his having been an official of the German State. The Netherlands law provides for increase of the penalty wherever the perpetrator of a war crime is an " official." This is an issue of no particular interest from the viewpoint of international law, and is, therefore, not dealt with in this Report.

stance under which the other acts were committed." There was, therefore, no basis for adjudication on this point as a separate offence.(1)

The accused was found guilty of the offences as established by the first Court, but in view of the mitigating circumstances and the nature of the offences, his sentence was reduced from 7 to 5 years' imprisonment.

B. NOTES ON THE CASE

1. CRIMINAL NATURE OF VIOLATIONS OF THE LAWS OF WAR AND ITS LEGAL BASIS

In its findings concerning the criminal nature of the acts committed by the accused, the first Court entered into the question of the legal basis on account of which such acts were punishable. On this occasion it gave reasons with which the Court of Cassation, whilst concurring with the first Court as to the fact that the acts concerned were criminal, could not agree.

The first Court came to the conclusion that the acts committed were contrary to the laws and customs of war for the following reasons :

(1) The war between Germany and the Netherlands was " an international crime " on the part of Germany. For this reason " everything done by the Germans as members of the occupying authorities, except

(1) The Court's conclusion was that, for the above reason, solution of " the questions of law raised thereby cannot be obtained in this case." As the Court of Cassation had thus remained silent on the subject, it is appropriate to make the following comments. Art. 10 of the Nuremberg Charter treats membership of an organisation declared criminal by the International Military Tribunal at Nuremberg as a separate offence. For this reason it is possible to hold the view advocated by the Netherlands prosecutor that, on this ground, it is a war crime in itself. The question, however, as to the jurisdiction of national courts over this particular crime is a separate issue. When in 1946-1947 the Netherlands Special Court of Cassation had considered the question of the jurisdiction of Netherlands Courts over war crimes, it came to the conclusion that, although Netherlands Courts were, generally speaking, competent to implement rules of international law, they could not do so without express municipal provisions to this effect. The Court took the view that, in the specific field of war crimes, such provisions were not present, and recommended the enactment of appropriate legislation. This was done on 10th July, 1947, as a consequence of which the concepts of war crimes and crimes against humanity were formally made part of Netherlands municipal law as they were defined in Art. 6 (*b*) and (*c*) of the Nuremberg Charter. In these definitions membership of criminal organisations is not specifically mentioned for the obvious reason that it was given separate treatment in Art. 10 of the Charter. As the Netherlands law had, strictly speaking, confined itself to the definitions of the above Art. 6, the opinion of the first Court that an explicit municipal provision was lacking, has also some grounds. On the other hand, however, the said definitions are not limited to the specific instances there enumerated, so that this leaves room for the inclusion of membership of criminal organisations under the concept of war crimes. The matter is one of legal interpretation and, from the viewpoint of Netherlands law, it lends itself to either solution. Finally, there is also the issue of the competence of Netherlands prosecuting officers to open proceedings in this field. Art. 10 of the Nuremberg Charter gives the right to prosecution to the " competent national authority of any *Signatory* " of the London Agreement of 8th August, 1945, by which the Nuremberg Charter was brought to life. The Netherlands was not a signatory, but only an " adherent " to the said Agreement and Charter. Some other adhering Powers met this point by making express provision for the punishment of membership of criminal organisations and treating it at the same time as a municipal law offence punishable independently of the Nuremberg Charter and of the proceedings of the Nuremberg Tribunal. Such course was taken, for instance, by France, Czechoslovakia and Poland. This course was not followed up by the Netherlands. For the history and substance of the Netherlands law, see *Annex* to Vol. XI of this series, pp. 89-91, and Notes in the trial of Hans Rauter, pp. 111-113 above. On the issue of the punishment of members of criminal organisations by competent courts, see *History of the United Nations War Crimes Commission, and the Development of the Laws of War*, London, H.M. Stationery Office, 1948, Chapter XI, especially pp. 303 *et seq.*

that which occurred in the normal exercise of the law," was " illegitimate."

(2) Detaining and guarding civilians on account of their race or religion, as well as ill-treating defenceless civilians " were not military operations " and could not, therefore, be justified by the " necessities of war." In virtue of Art. 43 of the Hague Regulations the occupant was, as a rule, under the obligation to respect the laws in force in occupied Holland, and this meant that it was bound to respect the Netherlands Constitution which, in its Art. 4, guarantees protection to persons and property. In virtue of Art. 23 (*h*) of the Hague Regulations, the occupant was not entitled to suspend the right of the Netherlands population to such protection.

(3) The acts committed were contrary to the laws of humanity, as the latter imposed the duty to " grant aid and protection to the defenceless and needy," whereas the accused's conduct could not be reconciled with this principle.

The Court of Cassation dissented from the first Court's opinion that all acts committed by the Germans against the Netherlands civilian population were criminal because of the war of aggression launched and waged by Germany against Holland. It agreed that the said war was an international crime, and added that on account of this fact the Netherlands " would have been authorised to answer " the aggression " with reprisals, even with regard to the normal operation of the laws of war on land, sea and in the air."(1) However, said the Court, " it is going too far to regard as war crimes all acts committed against the Netherlands or Netherlanders by the German forces and other organs during the war, solely on the grounds of the illegal nature of the war launched by the then German Reich." Such acts might be criminal even if the war itself were lawful.

The Court of Cassation dissented also from the reasons given by the first Court under (2) above, and in this connection came to the following conclusions :

The first Court's opinion that the acts committed were criminal because they did not form part of military operations and were thus not justified by the necessities of war, was based upon the erroneous view that the substance of the laws of war was to permit certain acts, whereas it was the opposite which was true : they prohibit certain acts. For this reason the question as to whether or not an act constituted a " military operation " was not decisive for determining whether it represented a war crime or a crime against humanity. This was to be established as an issue in itself in the sense of Art. 6 (*b*) and (*c*) of the Nuremberg Charter.

It was also " not reasonable " to make reference to Art. 43 of the Hague Regulations, in conjunction with the Netherlands Constitution. The Court did not elaborate on this point, but presumably meant that the criminal nature of the acts concerned did not depend on whether they were committed in violation of municipal law, either altered or suspended or not, but on whether they were contrary to the laws and customs of war taken in themselves. On the other hand, the Court explicitly dismissed the argument

(1) On the attitude of the Netherlands Courts towards the issue of reprisals in time of war, see *Trial of Hans Rauter*, pp. 129-137 above.

based on Art. 23 (*h*) of the Hague Regulations, on the grounds that it was meant only to protect rights at civil law and therefore did not apply in this case.

Finally, the Court of Cassation also disagreed with the reason given under (3) above. An act was not a war crime or a crime against humanity because it violated the " moral rule that the defenceless and needy may claim protection and help." It was so on account of its unlawful nature under the laws and customs of war as expressed in Art. 6 (*b*) and (*c*) of the Nuremberg Charter.

Subject to these particular differences of opinion the Court of Cassation agreed with the first Court's findings that the acts tried constituted war crimes and/or crimes against humanity and were punishable under the provisions of the Netherlands law applied by the first Court.

2. ILLEGAL DETENTION A CRIME AGAINST HUMANITY

The findings of both Courts show that they had found the accused guilty of complicity in illegal detentions, in so far as this applied to prisoners of the Jewish race.

The relevant passages of the first Court's findings were in the following terms :

> " The Court has been convinced and considers legally proved that the accused . . . contrary to the laws and customs of war, . . . :
>
> 1. Co-operated in the German policy of humiliation and persecution of the Jews . . . by :
>
> (*a*) Intentionally assisting in the illegal detention of a number of persons of the Jewish race in that he intentionally kept them illegally confined in the said prisons and guarded them . . ."

The Court of Cassation specified that this fell under the notion of " other inhumane acts committed against any civilian population " before or during the war, as prescribed in the definition of crimes against humanity in Art. 6 (*c*) of the Nuremberg Charter, and as applicable in Netherlands law according to Art. 27 (A) of the Netherlands Extraordinary Penal Law Decree of 22nd December, 1945.(1)

It thus appears that, in this trial, illegal detention was treated as an " inhumane act " on the grounds that it constituted at the same time a case of persecutions on racial or religious grounds, which in itself belongs also to the concept of crimes against humanity as defined in the said Art. 6 (*c*).

The conviction of the accused is an instance of a case in which persons whose part in illegal detentions are purely instrumental are none the less held responsible as accomplices.

3. DENIAL OF SPIRITUAL ASSISTANCE A CRIMINAL OFFENCE

When considering the charge that the accused was guilty of denying the services of a priest to prisoners condemned to death, the first Court came to the conclusion that it had " not been proved " that the accused's refusal was " contrary to the laws and customs of war or to [the laws] of humanity."

(1) See *Annex* to Vol. XI of this series, pp. 90-92.

The reason given by the Court was that no evidence was to hand to show that it was " the accused's duty to forward requests for spiritual assistance " to the competent authorities, nor that such requests " would not have been rejected in advance on the basis of the existing regulations."

The Court of Cassation acknowledged that it was within the first Court's powers to decide that the accused could not be held personally responsible on the above grounds, but it made it clear that, in its opinion, denial of spiritual assistance constituted a punishable offence. Its views were expressed in the following terms :

> " This Court . . . is of the opinion that the refusal to allow spiritual assistance to someone under sentence of death does . . . in itself definitely constitute a crime, both a war crime and a crime against humanity. However, in the present case the Special Court has passed judgment on grounds which are of a *de facto* nature and for which therefore it remains responsible, that in the given circumstances it was not appellant Zuehlke's duty to further requests for spiritual assistance."

4. PLEA OF SUPERIOR ORDERS IN NETHERLANDS LAW

Unlike the course taken by most countries affected by war crimes during the war 1939-1945, in Netherlands metropolitan special war crimes legislation(1) no specific provision was inserted as to the effect of the plea of superior orders on the personal penal liability of the actual perpetrator of a war crime. The Netherlands common penal law contains a general provision,—Art. 43 of the Penal Code—according to which a subordinate is, in principle, not punishable if the offence was committed in execution of an " official order given him by the competent authority." He is, however, liable to punishment if the official order was given " without competence." But even then, his liability is removed if he had considered " in all good faith " that the order was given " competently," and if his obedience to the order was " within his province as a subordinate."

As reported elsewhere,(2) when the enactment of metropolitan Netherlands war crimes laws was under study, the Special Court of Cassation recommended the adoption of the rule contained in Art. 8 of the Nuremberg Charter. This provided the following :

> " The fact that the defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires."

The starting point of the above rule was thus the opposite of the principle expressed in Art. 43 of the Netherlands Penal Code : according to it the subordinate is penally responsible in spite of the orders, and may obtain only mitigation of the punishment according to the merits of the case. Under Art. 43 the subordinate is, on the contrary, not penally responsible, and may be held guilty only in exceptional cases.

When the provisions relating to war crimes were enacted, the above recommendation was not followed up and the rule of Art. 8 of the Nurem-

(1) Besides the legislation in force in Metropolitan Holland, a separate set of rules is in force in the Netherlands East Indies. See *Annex* to Vol. XI of this series.

(2) See *Annex* to Vol. XI, pp. 98-100.

berg Charter was not adopted. This made it uncertain as to what was the position created in Dutch municipal law in regard to war crimes committed upon superior orders. There were, among others, two possible interpretations. The omission of a rule similar to that of Art. 8 of the Nuremberg Charter, could have meant that the rule of Art. 43 of the Penal Code was applicable to war crimes in addition to common law offences and, as a rule, had the effect of relieving from penal responsibility the perpetrator acting pursuant to superior orders. Another possible interpretation was that, in the specific instance of war crimes, the rule of Art. 43 was elastic enough to achieve the same ends as those secured under the Nuremberg Charter. Art. 43 made the subordinate punishable if the orders were issued " without competence " and if the subordinate could not be regarded as having followed the orders " in all good faith " as to their " competency." This made it possible to hold the view that no authority or superior was competent to issue criminal orders, and that consequently every such order was given " without competence."

The Zuehlke trial furnished an occasion to Netherlands Courts, including the Court of Cassation, to make known their views on the subject. They ultimately offered a third solution, according to which neither Art. 8 of the Nuremberg Charter nor Art. 43 of the Netherlands Penal Code were binding upon them, but the issue is treated with regard to certain minimum standards of justice which bring about results similar to those expressed in the Charter.

The first Court expressed the opinion that Art. 8 of the Nuremberg Charter, invoked by the prosecution, was not applicable because it did not, as the Court saw it, express a general rule of International Law and could not therefore be implemented as such by Netherlands Courts. The Court's view was that it constituted a special rule limited to the case of the major war criminals with whom the Charter was solely concerned, and consequently did not apply in the case of other, " minor " war criminals, such as the ones tried by Netherlands and other national courts. In this connection the Court took the view that the " exonerating effect " of a superior order was still valid in the sphere of " minor " war criminals and that therefore the accused had a formal legal basis to plead on those grounds. The Court expressed its opinion in the following terms :

> " The accused has pleaded that official orders were given him by his superiors.
>
> " The chief Prosecutor does not consider this plea to be admissible, himself referring to Art. 8 of the Charter whereby an official order was declared to be non-exculpatory.
>
> " This provision, however, . . . has no direct application in the present case, but could apply indirectly if it were to be regarded as a rule concerning a special instance of an express general rule of international criminal law.
>
> " It is the opinion of the Court that this is not so, and it cannot be understood why the exonerating effect of an official order, which is recognised in one form or another in practically all national legislations, should not be valid in the sphere of international criminal law.
>
> " It must be assumed that its operation has been excluded with regard to the ' major ' criminals, because they were considered *a priori* to have

wanted to take part in the criminal system of Germany and were, therefore, made individually responsible for the crimes they committed in this system.

" Consequently the accused has grounds for his plea."

While recognising in this fashion and for the above reasons the accused's right to plead not guilty on the grounds of superior orders, the first Court came to the conclusion that, in his case, the plea could not exonerate him from the charges. It based its findings in this respect on the opinion that subordinates were under the obligation not to carry out orders relating to " actions forbidden by international law," and that ignorance of the relevant rules did not " carry with it exclusion from penal liability " of the subordinates. The Court was also of the opinion that custody of persons detained on account of their race or religion, as well as ill-treatment of prisoners, did not belong to the " sphere of military subordination " ; that the accused must have had " knowledge " of this ; and that he was answerable also under German law, according to which subordinates who knew of the criminal nature of the acts ordered remain penally responsible. These views were expressed in the following terms :

" The Court rejects this plea. Indeed . . . there was no need for him [the accused] in the given circumstances to carry out such orders.

" An order to commit actions forbidden by international law may not be carried out, and a mistaken idea as to the validity or existence of such prohibitive provisions does not carry with it exclusion from penal liability.

" The detention in prison of persons who were incarcerated on the grounds of their origin, or the ill-treatment and humiliation of prisoners, does not belong to the sphere of military subordination.

" The accused, who was not only a prison warder by occupation but had also been trained as a non-commissioned officer, must have known this.

" The accused is also punishable according to provisions in force in Germany, which provide that in spite of an official order a subordinate remains criminally responsible if he knows that the order in question aims at the commission of a punishable act."

The Special Court took much the same course, but furnished a more elaborate legal basis for its findings. It discarded Art. 8 of the Nuremberg Charter for the same reason as the first Court, and also Art. 43 of the Netherlands Penal Code. It laid great stress on the relevance of the German law in the accused's specific case, by taking the view that the responsibility of the accused could best be judged in the light of the latter's hierarchical position under the law of his own country. It was held that this was permissible on condition that the German law in this field met the minimum requirements of justice as recognised by civilised nations, and it was found that this was the case with the German rules concerned. It is on this basis that the Court of Cassation reached the same conclusions as the first Court as to the accused's guilt. Its opinion was expressed in the following terms :

" According to Netherlands law the accused has the right to invoke the plea of official orders as a basis for exoneration from penal liability.

" This right could be limited or excluded only by the presence of a higher rule of law, and in the absence of a rule of international customary law in force during the Second World War, alone Art. 8 of the [Nuremberg] Charter can be taken into consideration in this case.

" This Article, however, does not contain anything before which the Netherlands law . . . should give way.

" As appears from the context of the text [of Art. 8] it relates only to the major war criminals for the trial of whom the International Military Tribunal [at Nuremberg] had been set up, and not to the other war criminals, such as is the appellant himself.

" The said Art. 8 is also not the expression of a principle of international law of wide purport, to be applied to all war criminals without exception.

" All the same, as the Special Court [in the first instance] rightly observes, this provision finds its justification in the exceptional case of the major war criminals within the scope of the German criminal policy.

" The judge is therefore called upon to test appellant Zuehlke's plea of official orders under the written and unwritten Netherlands law in force, according to which the trial of the so-called ' localised ' crimes committed by ' minor ' war criminals takes place pursuant to the Moscow Declaration of 30th October, 1943.(1)

" Art. 43 of the [Netherlands] Penal Code, which is also applicable to military men, does not come into consideration for direct application.

" The judgment of this Court is indeed . . . that an appeal to the above Article is justified only if the authority of the superior giving the order to the subordinate obeying it is based upon Netherlands law or an international rule of law binding upon Netherlands law.

" With the reserve mentioned below, this Court gives its preference to a test under the German law, rather than by an analogous application of Art. 43 of the Penal Code.

" Indeed reason requires that penal consequences of hierarchical subordination be judged according to the official framework within which the accused was placed, provided that his national law answers at least the minimum requirements which can be expected of a civilised nation.

" International law, upon which the trial of war criminals eventually rests, does not permit account to be taken if the accused's national law is below this standard.

" The German law in force during the Second World War did, however, satisfy on this point the minimum requirements.

" Art. 47 of the ' Militärstrafgesetzbuch ' [German Military Penal Code] of 1872, which was promulgated again—and on this point remained unaltered—by a Decree of the ' Ministerrat für die Reichsverteidigung ' [German Ministerial Council for the Defence of the Reich] of 10th October, 1940, . . . reads as follows :

(1) On the text and effect of the Moscow Declaration on the above point, see *History of the United Nations War Crimes Commission and the Development of the Laws of War*, London, 1948, H.M. Stationery Office, pp. 107-108.

' 1. If a penal provision is violated in the execution of an official order, the superior giving the order is alone responsible. Nevertheless the subordinate who obeys is liable to punishment as an accomplice :

(1) If he has exceeded the given order ;

(2) If he knew that the superior's order concerned an act aimed at the commission of a common or a military crime or offence.

' 2. If the guilt is small on the part of the subordinate, his punishment can be dispensed with.'

" From this it follows that an order given in the circumstances described in para. 1 under (2) above, does not exclude the unlawfulness of the subordinate's action."

The Court then made reference to authoritative German writers and to judgments rendered by German courts, which both concurred with the Court's conclusion. The Court ended its findings by considering the accused's position in the light of the extent to which he was compelled to act under superior orders, that is with regard to the presence or absence of duress :

" If during the Second World War the doctrine ' Befehl ist Befehl ' (orders are orders) was sometimes carried out by the German forces to the extreme of its logical consequences for obviously criminal purposes, no longer compatible with the human dignity of the subordinates, there was no legal basis to do so, and an appeal to duress on the part of the subordinate concerned can at the most be admitted if actual requirements concerning such duress were present.

" The appellant Zuehlke's plea of duress . . . is rejected on the sufficient grounds that it does not appear that any pressure was brought to bear upon him.

" When applying the German law the judge enjoys sufficient discretion to measure the extent of independence left in the face of superior orders according to the importance of the position held by the subordinate concerned.

" With his rank of non-commissioned officer and his position of prison guard only a slight degree of freedom of action can be ascribed to appellant.

" Within this framework some of the grounds on which the Special Court [in the first instance] rejected the appellant's plea of superior orders remain in any case in force.

" Therefore the Special Court has correctly decided that, as the acts with which appellant was charged and which were declared proved, were punishable, so was the appellant himself as their perpetrator punishable, since no grounds for exoneration from punishment have appeared with regard to him."

Apart from the manner in which the plea of superior orders was treated and applied in this trial, the main point of interest from the viewpoint of international law is the attitude taken towards the validity of the principle expressed in Art. 8 of the Nuremberg Charter.

This attitude was that the latter could not be regarded, at least for the time being, as a general rule of international law. This would seem to conflict with the development which took place on the occasion of and after the Second World War, and which was apparent at the time of the trial under review. The position is that, in addition to the Nuremberg Charter, other authoritative documents on the present state of international law, as well as rules of a representative number of nations, have followed the lines of the above Art. 8. Such was the case with the Far Eastern Charter, enacted for the trial of the Japanese major war criminals, and with Law No. 10 of the Allied Control Council for Germany which applies to all categories of war criminals other than those belonging to the class of " major " criminals. Such is also the case with the municipal laws or military manuals issued for the guidance of military personnel of Great Britian, United States, France, China, Canada, Norway, Czechoslovakia, Poland,(1) and even the Netherlands East Indies.(2) This development is evidence that, in the present stage of the advancement of international law as generally understood and as applied by individual nations, the above principle concerning the effect of superior orders upon penal liability for war crimes represents the wider consensus of opinion.(3)

The trial under review illustrates that the differences existing between the principles expressed respectively in Art. 43 of the Netherlands Penal Code and Art. 8 of the Nuremberg Charter, are more of a theoretical than of a practical nature. The former is based upon the principle that, *as a rule*, the subordinate is not guilty when acting upon superior orders he is pledged to obey. The latter is based upon the opposite principle that, again *as a rule*, superior orders do not relieve the subordinate from penal liability and that consequently he is, *as a rule*, liable to punishment as if he had acted without orders. Both, however, operate with exceptions which, in the instance of the Netherlands Penal Code and the German Military Penal Code, bring about practical results similar to those contained in the principle of the Nuremberg Charter. Conversely, the latter makes possible mitigation of punishment which may and in practice do result in freeing the accused from penal responsibility. Whatever the principle chosen as a starting point, the outcome is that cases are tried according to their merits and that justice is done with similar results under either of them.

(1) For the state of the relevant rules prior to this development see H. Lauterpacht, " The Law of Nations and the Punishment of War Crimes," *British Year Book of International Law*, pp. 69-73. For the rules now in force see *History of the United Nations War Crimes Commission and the Development of the Laws of War*, London, 1948, H.M. Stationery Office, pp. 280-286.

(2) See *Annex* to Vol. XI of this series, pp. 98-99.

(3) The accounts of the Netherlands law in the above mentioned *History of the United Nations War Crimes Commission and the Development of the Laws of War*, pp. 285-286, and in the *Annex* to Vol. XI of this series, pp. 98-100, were given at the time when the Netherlands Courts had not yet expressed opinion on the subject. They should therefore be understood in the light of the position as it arises from the trial under review.

ANNEX

CHINESE LAW

CONCERNING TRIALS OF WAR CRIMINALS

I. INTRODUCTORY NOTES

The trial of war criminals before Chinese courts is regulated by a " Law governing the Trial of War Criminals " of 24th October, 1946. The latter deals with questions of both substantive and procedural law. It defines the rules which are applicable to offences tried as war crimes, and lays down provisions as to the jurisdiction of the competent courts over these offences and the individuals liable to prosecution and punishment for their commission.

The legal basis provided is very wide as it includes, simultaneously and in a given order of precedence, international law, special war crimes rules, and provisions of Chinese common penal law.

The Law of 24th October, 1946, is in many respects guided by circumstances which are peculiar to China and the events she has gone through during the last two decades. It reflects in particular great care on the part of the legislator to provide retribution for a wide range of offences, spread over a long period of time during which the Chinese people had been subjected to an uninterrupted series of atrocities and other crimes at the hands of the Japanese invader.

II. SOURCES OF RELEVANT PROVISIONS

Art. I of the Law of 24th October, 1946, lays down the following rule as to the provisions applicable to war crime trials :

> " In addition to the Rules of International Law, the present Law is applicable to the trial and punishment of War Criminals. Cases not provided for under the present Law are governed by the Criminal Code of the Republic of China.
>
> " In applying the Criminal Law of the Republic of China, this Law shall first be applied, irrespective of the status of the offender."

In this manner rules of international law were recognised as the primary source for the trial of war criminals. They are supplemented by the special provisions of the Law of 24th October, 1946, which are valid as " additional " to rules of international law. On the other hand and as a subsidiary source, provisions of the Chinese Penal Code are relevant in cases not covered by the Law of 24th October, 1946, or by rules of international law.

III. DEFINITION OF A WAR CRIMINAL AND A WAR CRIME

Article II of the Law of 24th October, 1946, contains a combined definition of individuals treated as war criminals and of offences falling within the notion of war crimes according to Chinese legislation. It reads as follows :

> " A person who commits an offence which falls under any one of the following categories shall be considered a war criminal :
>
> 1. Alien combatants or non-combatants who, prior to or during

the war, violate an International Treaty, International Convention or International Guarantee by planning, conspiring for, preparing to start or supporting, an aggression against the Republic of China, or doing the same in an unlawful war.

2. Alien combatants, or non-combatants who during the war or a period of hostilities against the Republic of China, violate the Laws and Usages of War by directly or indirectly having recourse to acts of cruelty.

3. Alien combatants or non-combatants who during the war or a period of hostilities against the Republic of China or prior to the occurrence of such circumstances, nourish intentions of enslaving, crippling, or annihilating the Chinese Nation and endeavour to carry out their intentions by such methods as (*a*) killing, starving, massacring, enslaving, or mass deportation of its nationals, (*b*) stupefying the mind and controlling the thought of its nationals, (*c*) distributing, spreading, or forcing people to consume, narcotic drugs or forcing them to cultivate plants for making such drugs, (*d*) forcing people to consume or be innoculated with poison, or destroying their power of procreation, or oppressing and tyrannising them under racial or religious pretext, or treating them inhumanly.

4. Alien combatants or non-combatants who during the war with or a period of hostilities against the Republic of China, commit acts other than those mentioned in the three previous sections but punishable according to Chinese Criminal Law."

Paragraph 1 of the above Article covers the field of offences known as *crimes against peace* under the rules of international law as expressed in the most recent documents embodying such rules : Article 6 (*a*) of the Charter of the International Military Tribunal at Nuremberg ; Article 5 (*a*) of the Charter of the International Military Tribunal for the Far East ; and Article II (1) (*a*) of Law No. 10 of the Allied Control Council for Germany.(1)

Paragraph 2 covers the field of *war crimes* in the narrower sense, that is of violations of the laws and customs of war. The latter are explicitly provided against in Article 6 (*b*) of the Nuremberg Charter, Article 5 (*b*) of the Far Eastern Charter, and in Article II (1) (*b*) of Law No. 10. Following the practice of some other countries,(2) the Chinese Law of 24th October, 1946, contains an elaborate list of offences regarded as constituting war crimes in the narrower sense, similar to that which was drawn up by the 1919 " Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties." The list is given in Article III of the Law of 24th October, 1946, and runs as follows :

1. Planned slaughter, murder or other terrorist action.
2. Killing Hostages.
3. Malicious killing of non-combatants by starvation.
4. Rape.
5. Kidnapping children.

(1) For the text of the definitions of crime against peace in the above provisions, see *Trial of Takashi Sakai* in this Volume, pp. 3-4.

(2) See for instance *Netherlands Law Concerning Trials of War Criminals* in the *Annex* to Vol. XI of this series, pp. 93-94, and the *Annex* concerning Australian war crimes laws in Vol. V, pp. 95-96.

6. Enforcing collective torture.
7. Deliberate bombing of non-defended areas.
8. Destroying freighters or passenger boats without previous warning and without regard to the safety of passengers and crew.
9. Destroying fishing boats and relief ships.
10. Deliberate bombing of Hospitals.
11. Attack or sinking of Hospital Ships.
12. Use of poison gas or bacteriological warfare.
13. Employment of inhuman weapons.
14. Ordering wholesale slaughter.
15. Putting poison on food or drinking water.
16. Torturing of non-combatants.
17. Kidnapping females and forcing them to become prostitutes.
18. Mass deportation of non-combatants.
19. Internment of non-combatants and inflicting on them inhuman treatment.
20. Forcing non-combatants to engage in military activities with the enemy.
21. Usurpation of the sovereignty of the occupied territory.
22. Conscription by force of inhabitants in the occupied territory.
23. Scheming to enslave the inhabitants of occupied country or to deprive them of their status and rights as nationals of the occupied country.
24. Robbing.
25. Unlawful extortion or demanding of contributions or requisitions.
26. Depreciating the value of currency or issuing unlawful currency notes.
27. Indiscriminate destruction of property.
28. Violating Red Cross regulations.
29. Ill-treating prisoners of war or wounded persons.
30. Forcing prisoners of war to engage in work not allowed by the International Convention.
31. Indiscriminate use of the Armistice Flags.
32. Making indiscriminate mass arrests.
33. Confiscation of property.
34. Destroying religious, charity, educational, historical constructions or memorials.
35. Malicious insults.
36. Taking money or property by force or extortion.
37. Plundering of historical, artistic or other cultural treasures.
38. Other acts violating the law or usages of war, or acts whose cruelty or destructiveness exceeds their military necessity, forcing people to do things beyond their obligation, or acts hampering the exercise of legal rights.

It should be observed that this list is in many respects wider in scope than the terms used in the 1919 list of war crimes.

Offences included in Article II, paragraph 3, of the Chinese Law of 24th October, 1946, correspond in spirit with the concept of *crimes against humanity* as it evolved in the definitions of Article 6 (*c*) of the Nuremberg Charter, Article 5 (*c*) of the Far Eastern Charter, and Article II (1) (*c*) of

Law No. 10. These provisions cover a field of acts which do not or may not constitute war crimes in the narrower sense, but are similar to them on account of their inhumane nature. They are generally understood to be acts committed systematically, repeatedly and on a vast scale against the civilian population, in pursuance of purposes ranging from the forcible denationalisation of the population to its biological extermination. A notable feature of the Chinese definition is the emphasis on and express reference to narcotic drugs and poisons which are of especial importance in Far Eastern countries. Another emphasis is that put on " stupefying the mind and controlling the thought " of the Chinese population. This, in contradistinction to drugs and poisons which are mentioned separately, would seem to include psychological means of action.

Finally, offences provided against in paragraph 4 are those of Chinese common penal law when committed during the war with or a period of hostilities against China and which, at the same time, constitute neither a crime against peace, nor a war crime in the narrower sense, nor a crime against humanity, as covered by the other paragraphs of Art. II.

From the above classification it appears that the Chinese legislation has adopted the concept of war crimes in a wider, non-technical sense, as a common denominator for types of offences which are, otherwise, distinct one from the other within the body of international law.

IV. PERPETRATORS AND RELEVANT PERIODS OF TIME

According to the above-cited Article II individuals liable to punishment for any of the above types of offences are " alien combatants or non-combatants." This is in accord with the legislation of most countries as well as with rules of international law, according to which the notion of a war criminal is in general limited to subjects of a foreign nation. Subjects of the country whose nationals were victimised, if guilty of one of the above offences, are tried as traitors, quislings or ordinary criminals, as the case may be, under the rules of their country's common law.

This difference is, indirectly, stressed in Article VI of the Law of 24th October, 1946. The latter makes the rules of the Law of 24th October, 1946, applicable " also to war criminals who may have regained Chinese citizenship after 25th October, 1945." The effect is that a former Chinese subject, who had become an alien but had regained his original nationality after the said date, is tried according to his previous alien status, and not as a Chinese citizen.

In the paragraphs of Art. II dealing with the various offences stress was laid on different periods of time relevant for holding the perpetrators guilty under the terms of the Law of 24th October, 1946.

For crimes against peace the period mentioned is that running " prior to or during the war." The time preceding a war relates to " planning, conspiring or preparing " a war of aggression and may therefore go far back in the past according to the case. The same is implied in the definitions of crimes against peace contained in the international documents previously referred to.

For war crimes in the narrower sense the relevant period is that running " during the war or a period of hostilities " against China. It should be

noted that the " period of hostilities," as distinct from that of the war, was inserted with regard to and in order to cover the period during which China and Japan were in a state of *de facto* belligerency before the outbreak of World War II. According to Art. IV of the Law of 24th October, 1946, this state started on 18th September, 1931, that is on the invasion of Manchuria by Japan. The same period was made relevant for crimes punishable under the Chinese Penal Code, as provided by Art. II, para. 4, of the Law of 24th October, 1946.

Finally, the period relevant for crimes against humanity is that running " during the war or a period of hostilities against the Republic of China or prior to the occurrence of such circumstances." The latter part of the provision makes crimes against humanity, as covered by Art. II, para. 3, of the above Law, punishable even when committed before 18th September, 1931. Under the terms of Art. IV the same applies to crimes against peace, as acts undertaken with a view to planning, conspiring for, or preparing a war of aggression, which form part of the concept of crimes against peace, do not lend themselves to be circumscribed by any specific date limit preceding the outbreak of actual hostilities. By providing for the punishment of acts constituting crimes against humanity which were committed before the war,—in China before 18th September, 1931,—the Chinese Law of 24th October, 1946, followed the lines of the Nuremberg and Far Eastern Charters. Both Charters explicitly refer to inhumane acts committed against civilian populations " before or during the war." Under both Charters the proviso is that such acts have been committed " in execution of or in connection with " crimes against peace or war crimes. The position would seem to be similar under the terms of Art. II, para. 3 of the Chinese Law of 24th October, 1946. The latter speaks of acts committed by " alien combatants or non-combatants " pursuant to " intentions of enslaving, crippling, or annihilating the Chinese Nation." The context is that this is done " during the war or a period of hostilities " or " prior to the occurrence of such circumstances." There is little doubt that this phraseology describes in fact acts which include crimes against peace.

According to Art. IV of the Law of 24th October, 1946, the end of the war in China is set at 2nd September, 1945. The same Article specifies that all provisions of Art. II are applicable to offences committed between 18th September, 1931, and 2nd September, 1945, with the exception of acts punishable under para. 1 (crimes against peace) and para. 2 (crimes against humanity) which remain subject to prosecution if committed before 18th September, 1931.

In order to give clear guidance for the trial of offences committed after September, 1945, Art. V of the Chinese Law specifies that such offences, when committed by aliens before their being interned but after 3rd September, 1945, are not tried under the rules of the Law of 24th October, 1946, but under those of Chinese Penal Law and before ordinary military tribunals.

V. STATUS OF THE VICTIMS

The offences tried under the terms of the Chinese Law of 24th October, 1946, are those committed against victims of Chinese nationality. Special provision was, however, made to the effect that offences committed against Allied nations or their nationals, or against aliens under the protection of

the Chinese Government, were also subject to prosecution and trial before Chinese courts. Art. VII of the Chinese Law, which contains the above rule, does not say whether such offences need be committed on Chinese territory or on territory under Chinese control, or whether they include as well offences perpetrated outside Chinese territory. In the former case the rule would be an application of the territorial principle which is at the basis of most penal law systems. In the latter case, the competence of Chinese courts would be based on the principle of the universality of jurisdiction of municipal courts in the sphere of war crimes, as practised by courts of certain countries, such as the United States.

VI. CIRCUMSTANCES NOT EXONERATING WAR CRIMINALS

Art. VIII of the Law of 24th October, 1946, lays down the rule that the following circumstances do not in themselves relieve the perpetrator from penal liability for war crimes :

(1) that crimes were committed by order of superior officers ;
(2) that crimes were committed as a result of official duty ;
(3) that crimes were committed in pursuance of the policy of the offender's government ;
(4) that crimes were committed out of political necessity.

The above rule follows the lines adopted on the subject in the Nuremberg and Far Eastern Charters, and also in Law No. 10 of the Allied Control Council for Germany. So, for instance, the commission of crimes upon superior orders is dealt with in Art. 8 of the Nuremberg Charter, in the following terms :

> " The fact that the Defendant acted pursuant to order of his government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires."

A similar rule on superior orders appears in the Far Eastern Charter and in Law No. 10. The wording of the Chinese Law concerning crimes perpetrated pursuant to one's Government's policy would seem to be covered by the above provision of the Nuremberg Charter where it refers to acts undertaken upon governmental orders. It may well be, however, that the Chinese rule has on this point a wider meaning than that expressed in the concept of an order, and that it includes cases where a governmental policy is carried out without specific orders from superiors, upon the offender's own initiative.

The Chinese rule does not specify the effect of the irrelevance of superior orders, and as a consequence does not expressly provide for mitigation of punishment if the court so sees fit. It is, however, safe to assume that Chinese courts have in this sphere powers similar to those of other courts, both international and municipal, and are therefore entitled to pronounce milder sentences according to the merits of each case.

In addition to superior orders and to acts undertaken pursuant to governmental policy, the Chinese rule refers also to crimes committed as a result of " official duty," and to those perpetrated out of " political necessity." The connotation of both these concepts is that an offence was committed by

individuals holding official positions and acting on behalf of the State or Government. The irrelevance of the offender's official position for his penal responsibility for war crimes is also prescribed by rules of international law, such as, for instance, by Art. 7 of the Nuremberg Charter :

> " The official position of defendant's whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment."

Similar rules are contained in the Far Eastern Charter and in Law No. 10.

VII. RESPONSIBILITY OF PERSONS IN AUTHORITY

Art. IX of the Law of 24th October, 1946, provides the following :

> " Persons who occupy a supervisory or commanding position in relation to war criminals and in this capacity have not fulfilled their duty to prevent crimes from being committed by their subordinates shall be treated as accomplices of the war criminals."

The effect of this provision is that not only superiors who issue orders, but also those who tolerate criminal acts of their subordinates without undertaking appropriate measures with a view to preventing such acts from occurring, are held penally responsible in the same manner as the perpetrators themselves. This rule was recognised by the law of other nations as well and applied in a number of important trials.(1)

VIII. PUNISHMENT

The Law of 24th October, 1946, prescribes penalties according to the different types or classes of offences covered by its Art. II.

Art. X contains the following rule :

> " War criminals who are guilty of offences provided against under paragraph 1 and paragraph 3 of Art. II shall be sentenced to death or life imprisonment."

The offences concerned in this provision are those constituting crimes against peace and crimes against humanity. It will be noticed that in these cases the choice is left only between the two severest punishments in criminal law.

Art. XI prescribes penalties for offences constituting war crimes in the narrower sense. Penalties are laid down according to the list of offences given in Art. III, and are as follows :

> (*a*) The penalties for offences provided against under items 1-15 of Art. III are death or life imprisonment.
>
> (*b*) The penalties for offences provided against under items 16-24 of Art. III are, alternatively, death, life imprisonment, or imprisonment for a period of 10 years.
>
> (*c*) Offences provided against under items 25-37 of Art. III are

(1) See *Trial of Tomoyuki Yamashita*, Vol. IV of this series, pp. 83-96 ; *Trial of Erhard Milch*, Vol. VII of this series, pp. 61-64 ; *Trial of General Wilhelm List and others*, Vol. VIII of this series, pp. 88-9 ; *Trial of Wilhelm von Leeb and* 13 *others* (High Command Trial), Vol. XII of this series, pp. 105-12.

punishable by life imprisonment or imprisonment for not less than 7 years.

(*d*) Offences provided against under item 38 of Art. III are punishable by life imprisonment or imprisonment for not less than 7 years, with the proviso that offences of a more serious nature are punishable by death.

Offences covered by paragraph 4 of Art. II, that is those provided against by the Chinese Penal Code, entail the respective punishments of the Code.

IX. RULES CONCERNING PRESCRIPTION AND REDUCTION OF PUNISHMENT

The effect of certain rules of Chinese common penal law was suspended in the case of war crimes.

Under the terms of Art. IV of the Law of 24th October, 1946, the prosecution of war crimes is not subject to prescription as provided by Art. 80 of the Chinese Penal Code. The latter lays down various periods of time, ranging from one to twenty years, after the expiry of which the prosecution of the offences concerned becomes extinct.

On the other hand, a law of 17th June, 1944, provided for the reduction of punishments in certain cases. Art. XIII of the Law of 24th October, 1946, made such reduction inoperative in war crimes cases.

X. COURTS TRYING WAR CRIMINALS

Individuals guilty of offences under Art. II and III of the Law of 24th October, 1946, are tried by special " Military Tribunals for the Trial of War Criminals." These Tribunals are attached to various military organisations by decision of the Chinese Ministry of Defence. The establishment and powers of such Tribunals are determined by the Chinese War Crimes Commission after approval by the Ministry of Defence and the Ministry of Justice.

According to Art. XVII of the Law of 24th October, 1946, a Military Tribunal for the Trial of War Criminals is composed of 5 military judges and 1 to 3 military prosecutors. The number of both may be increased when necessary. According to Art. XVIII three of the five judges are selected from various military organisations. The remaining two are selected by the Ministry of Justice from provincial or municipal higher courts. A similar selection is made of the prosecutors ; one comes from military ranks, and one or two are chosen by the Ministry of Justice from the ranks of prosecutors of provincial or municipal higher courts.

Cases are, as a rule, heard in the seat of the Tribunal. Wherever the case so requires, however, the Tribunal may designate three judges and one prosecutor to hold the trial at the place of the crime.

XI. JUDGMENT, CONFIRMATION OF SENTENCE AND RE-TRIAL

When a trial ends with a verdict of " not guilty " or when the prosecutor deems a prosecution unnecessary or unwarranted, the case is submitted to the Ministry of Defence for confirmation within one week of the pronouncement of the judgment or of the decision not to resume the prosecution. If

the case gives rise to doubts, the Ministry may refer the case back for re-trial on further investigation.

Trials ending in conviction are transmitted to the Ministry of Defence for confirmation. Cases involving death sentences or life imprisonment are further submitted by the Ministry to the President of the Republic for a fiat of execution. If the Ministry or the President consider the judgment to be faulty or improper, they may return the case for re-trial. Every case re-tried is subject to the same procedure as above.

The accused is entitled to appeal for a re-trial under the rules of Chinese military penal law, within 10 days of the judgment.

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